(1)

o. 84-1023-CFY
tatus: GRANTED

Title: Lrited States, Petitioner
v.
Fernando Rojas-Contreras

ocketed:
ecember 26, 1984

Court: Lritec States Court of Appeals
for the Ninth Circuit

Counsel for petitioner: Solicitor Gereral

Counsel for respcrcent: Clarke,Judy Clare

ntry	Date	Note	Proceedings and Orders
1	Nov 15 1984		Application for extension of time to file petition arc crcer granting same until December 26, 1984 (Rehrquist, November 17, 1934).
2	Dec 26 1934	G	Petition for writ of certiorari filec.
3	Jan 28 1985		Brief of respcrdent Fernarcos Rocas-Contreras in ccpcsition filec.
5	Jan 30 1985		REDISTRIBLTED. February 15, 1985
6	Jan 29 1985	G	Motion of respcncent for leave tc prcceec in forma pauperis filec.
7	Feb 11 1985	X	Reply brief of petitioner United States filec.
8	Feb 19 1985		Motion of respcncent for leave tc prcceec in forma pauperis GRANTED. Justice Powell CUT.
9	Feb 19 1985		Petition GRANTED. Justice Powell CUT.
			**********
10	Feb 23 1985	G	Motion of respcncent for appcintment of counsel filec.
11	Mar 3 1985		DISTRIBUTED. March 15, 1985. (Motion of respcrcent for appcintment of ccunsel).
12	Mar 18 1985		Motion for appcintment of counsel GRANTED anc it is crcerec that Judy Clare Clarke, Esc., of San Diegc, Californias, is appointed tc serve as counsel for the respcrdent ir this case. Justice Powell CUT.
13	Mar 29 1985	G	Motion of the Solicitor Gereral to disperse with printing the joint appencix filec.
15	Apr 4 1985		Crcer extending time tc file brief of petiticrer cn the merits until May 6, 1985.
16	Apr 15 1985		Motion of the Solicitor General to disperse with printing the joint appencix GRANTED.
17	May 6 1985		Brief of petitiorer United States filed.
18	Jun 4 1985		Recorc filed.
19	Jun 4 1985		Certified original recorc & C.A. proceedings, 5 volumes, received.
21	Jun 14 1985		Order extending time tc file brief of respcncent cn the merits until July 22, 1985.
22	Jul 17 1985		Brief of respondent Fernarcos Rocas-Contreras filec.
23	Jul 18 1985		SET FCR ARGUMENT, Wecnescay, Cctcber 9, 1985. (3rd case)
24	Aug 7 1985		CIRCULATED.
25	Oct 2 1985	X	Reply brief of petitioner United States filec.
26	Oct 9 1985		ARGUED.

BEST AVAILABLE COPY

1 pp

84-1023

No.

Office - Supreme Court, U.S.
FILED
DEC 26 1984
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA, PETITIONER

v.

FERNANDO ROJAS-CONTRERAS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

ANDREW L. FREY
Deputy Solicitor General

JOSHUA I. SCHWARTZ
Assistant to the Solicitor General

PATTY MERKAMP STEMLER
Attorney
Department of Justice
Washington, D.C. 20530
(202) 633-2217

32 pp

QUESTIONS PRESENTED

1. Whether the defense preparation period provision of the Speedy Trial Act, 18 U.S.C. 3161(c)(2), prohibits commencement of trial within 30 days of a defendant's arraignment on a superseding indictment when a defense preparation period of 30 days has been allowed following arraignment on the original indictment.

2. Whether, in the circumstances of this case, any violation of Section 3161(c)(2) was harmless.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statute involved	2
Statement	2
Reasons for granting the petition	8
Conclusion	21
Appendix A	1a
Appendix B	3a
Appendix C	5a

TABLE OF AUTHORITIES

Cases:

Heisler v. *United States*, 394 F.2d 692, cert. denied, 393 U.S. 986	20
United States v. *Arkus*, 675 F.2d 255	5, 6, 7, 16
United States v. *Aviles*, 623 F.2d 1192	14
United States v. *Bounos*, 730 F.2d 468	11
United States v. *Buble*, 440 F.2d 405, cert. denied, 404 U.S. 828	20
United States v. *Cronic*, No. 82-660 (May 14, 1984)	19
United States v. *Daly*, 716 F.2d 1499	8, 18
United States v. *Darby*, 744 F.2d 1508	9
United States v. *Dawson*, 516 F.2d 796	20
United States v. *Dennis*, 625 F.2d 782	11
United States v. *Harris*, 724 F.2d 1452	7, 8, 16
United States v. *Hasting*, No. 81-1463 (May 23, 1983)	17
United States v. *Horton*, 676 F.2d 1165, cert. denied, 459 U.S. 1201	6, 7, 10, 11, 16
United States v. *McDonald*, 456 U.S. 1	11
United States v. *Mers*, 701 F.2d 1321	9
United States v. *Rodriguez-Restrepo*, 680 F.2d 920	11

Cases—Continued: Page

United States v. *Rush*, 738 F.2d 497 ..... 12, 16, 17
United States v. *Todisco*, 667 F.2d 255 16
United States v. *Williford*, No. 83-1376 (5th Cir. Feb. 27, 1984), cert. denied, No. 83-6814 (Oct. 9, 1984) 16
United States v. *Wooten*, 688 F.2d 941 16
Williford v. *United States*, No. 83-6814 (Oct. 9, 1984) 15

Statutes and rule:

Speedy Trial Act of 1974, Tit. I, 18 U.S.C. 3161 *et seq.* 9
18 U.S.C. 3161(b) 17
18 U.S.C. (1976 ed.) 3161(c) 9
18 U.S.C. 3161(c) 10
18 U.S.C. 3161(c)(1) 9, 17
18 U.S.C. 3161(c)(2) ..... *passim*
18 U.S.C. 3161(d)(1) 10, 11
18 U.S.C. 3161(h) 9, 13
18 U.S.C. 3161(h)(6) 11
18 U.S.C. 3161(h)(8) 13
18 U.S.C. 3161(h)(8)(B)(iv) 14
18 U.S.C. 3162(a)(1) 17
18 U.S.C. 3162(a)(2) 13, 17
18 U.S.C. 3162(b) 18
18 U.S.C. 3164(c) 18
8 U.S.C. 1325 ..... 2, 3, 4
8 U.S.C. 1326 3
28 U.S.C. 2111 17
Fed. R. Crim. P. 52(a) 17

Miscellaneous:

A. Partridge, *Legislative History of Title I of the Speedy Trial Act of 1974* (Fed. Judicial Center 1980) 10
Comm. on the Administration of the Criminal Law of the Judicial Conference of the United States, *Guidelines to the Administration of the Speedy Trial Act of 1974, As Amended* (rev. 1979, with Aug. 1981 amendments) 12

Miscellaneous—Continued: Page

Comm. on the Administration of the Criminal Law of the Judicial Conference of the United States, *Guidelines to the Administration of the Speedy Trial Act of 1974, As Amended* (rev. 1979, with amendments through Oct. 1984) 12
S. Rep. 96-212, 96th Cong., 1st Sess. (1979) 9

In the Supreme Court of the United States

OCTOBER TERM, 1984

No.

UNITED STATES OF AMERICA, PETITIONER

v.

FERNANDO ROJAS-CONTRERAS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-2a) is unreported. The district court's oral ruling denying respondent's motion for a continuance (App., *infra*, 3a-4a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 2, 1984. A timely petition for rehearing was denied on September 26, 1984 (see App., *infra*, 5a). On November 17, 1984 Justice Rehnquist extended the time within which to file a petition for a writ of certiorari to and including December 26, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The Speedy Trial Act provides in pertinent part (18 U.S.C. 3161(c)(2)):

> Unless the defendant consents in writing to the contrary, the trial shall not commence less than thirty days from the date on which the defendant first appears through counsel or expressly waives counsel and elects to proceed pro se.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of California, respondent, a Mexican citizen, was convicted of illegal entry into the United States having been convicted previously of the same offense, in violation of 8 U.S.C. 1325. He was sentenced to a term of imprisonment of one year and one day. The court of appeals reversed on Speedy Trial Act grounds.

1. The evidence at trial showed that respondent is a citizen of Mexico and not a United States citizen. On December 7, 1981, respondent was convicted of illegal entry into the United States and was sentenced to one year's imprisonment. After serving his sentence, he was returned to Mexico (Tr. 256-257).

Thereafter, at approximately 4:00 a.m. on February 13, 1983, respondent entered the United States on foot, five miles east of the Chula Vista official point of entry. He carried no immigration documents with him. Respondent walked north along a flat mesa, crossed the Otay River, and stopped to rest on the southwest bank of Otay Lake. At 9:30 a.m., Border Patrol Agent William Harris found respondent and another alien sitting along the bank. Five other aliens were hiding nearby under a sheet of plastic. Each

member of the group had muddy shoes and grass and straw in his hair, indicating that the group had just hiked from the border. Agent Harris asked the group if they were from Mexico, to which they replied, "yes." Tr. 156-166, 181, 186-192, 262.

Agent William Burt arrived at the scene and recognized respondent as someone he had arrested before. Respondent was taken to the Brown Field Station, and after waiving his *Miranda* rights, he agreed to talk to Agent Burt. Respondent identified himself as "Santiago Montano Meneses." He admitted that he had entered the United States that morning five miles east of the official port of entry and that he carried no documents entitling him to enter the United States. He further admitted that he had a prior arrest record for illegal entry. Respondent signed a voluntary departure form acknowledging that "I am illegally in the United States." Tr. 189-193, 209-217.

That night, after again waiving his *Miranda* rights, respondent told Border Patrol Agent Ted Stark that his name was in fact Fernando Rojas-Contreras, and that he had previously been convicted of and had served time for illegal entry. He also acknowledged that he had been sent back to Mexico upon his release from prison and that he had reentered the United States through the hills south of Otay Lake early that morning. Tr. 259-265.

2. On February 18, 1983, a federal grand jury sitting in the Southern District of California returned a two-count indictment charging respondent with felony illegal entry, in violation of 8 U.S.C. 1325, and reentry by a deported alien, in violation of 8 U.S.C. 1326. The indictment stated that the judgment of conviction for the prior illegal entry,

which formed the predicate for the Section 1325 offense, was "rendered on or about December 17, 1981" (E.R. 4).[1] Respondent was arraigned on the two-count indictment on February 18, 1983. Trial was thereafter scheduled for April 19, 1984.

The date of the predicate conviction (actually December 7, 1981) was misstated by ten days in the February 18 indictment as a result of a typographical error (Tr. 15). It is undisputed that, on March 21, 1983, the respondent was provided with discovery by the government that disclosed the correct date of the predicate conviction (Tr. 15, 24).[2] On April 15, 1983, the grand jury returned a superseding indictment correcting the typographical error in Count

[1] "E.R." denotes the excerpt of record prepared by respondent's counsel and filed in the court of appeals. Count One of the February 18 indictment charged, in its entirety (E.R. 3-4):

> On or about February 13, 1983, within the Southern District of California, defendant FERNANDO ROJAS-CONTRERAS, who was then and there an alien, did knowingly and unlawfully enter the United States from Mexico at a point near San Ysidro, San Diego County, California, which said time and place were then and there other than as designated by immigration officials of the United States for the entrance of immigrants into the United States; that before the commission of the offense hereinbefore set forth, said defendant was, in the United States District Court for the Southern District of California, convicted of the crime of illegal entry, and the judgment was pronounced and rendered on or about December 17, 1981; in violation of Title 8, United States Code, Section 1325.

[2] It also appears that respondent was represented in the first prosecution by counsel associated with the Federal Defenders of San Diego, Inc., which also supplied his counsel in connection with the present prosecution (Tr. 21-22).

One by changing "17" to "7." The superseding indictment charged the same two offenses as the original indictment; indeed, it was in all other respects word for word the same as the original indictment (See E.R. 6-7). Respondent was arraigned on the superseding indictment on April 18, 1983 (Tr. 5-6).

2. At a pretrial conference later on April 18, 1983, defense counsel made an oral motion for a 30-day continuance of the trial scheduled to commence the next day. He argued that, under Section 3161(c)(2) of the Speedy Trial Act, as interpreted by the Ninth Circuit in *United States* v. *Arkus*, 675 F.2d 245 (1982), a defendant has an absolute right to a new 30-day trial preparation period following the return of a superseding indictment, even though the statutory trial preparation period has already been allowed following the original indictment. Defense counsel asserted (Tr. 6) that *Arkus*

> holds once there is a rearraignment I have an automatic, if I so claim it, 30-day period. In fact, it's only to be excused if there's an express waiver of counsel. And so therefore under the statute and under *Arcus* [*sic*], I would make that demand.

Defense counsel simply relied on *Arkus*, which he described as "rather clear-cut on the interpretation of 18 U.S.C. 3161(C)(2)" (Tr. 9). He did not claim that respondent was in any respect prejudiced by the alteration in the date of the predicate offense accomplished by the superseding indictment, and he did not deny that he had been advised of the typographical error in the original indictment well in advance of the scheduled trial date. Respondent's counsel did argue that he needed additional time to consult a finger-

print expert and to review respondent's immigration ("A") file, but he did not claim that these tasks had anything to do with the change in the indictment. Review of the immigration file, counsel stated, was necessary to defend the illegal entry violation charged in Count Two; the fingerprint expert was needed to determine whether respondent was the same person convicted of illegal entry on December 7, 1981. Tr. 10-12.

Citing the Seventh Circuit's decision in *United States* v. *Horton*, 676 F.2d 1165 (1982), cert. denied, 459 U.S. 1201 (1983), and seeking to distinguish *Arkus* on factual grounds, the government disputed that the Speedy Trial Act required a new 30-day defense preparation period following the return of a superseding indictment in the circumstances of this case (Tr. 15-16, 17, 18-19). With respect to the practical justifications given by respondent for a continuance, the government pointed out that its own fingerprint expert had not yet compared respondent's prints to the prints of the person convicted on December 7, 1981, but that he planned to do so the following morning. The court ordered the government to have its expert contact defense counsel with the results of the analysis as soon as he had completed the task (Tr. 26-27). Ultimately, however, respondent agreed to stipulate that he was indeed the person convicted of illegal entry on December 7, 1981, thereby making unnecessary expert testimony as to respondent's identity (Tr. 61, 256-257). In order to moot respondent's plea that he could not defend the charge in Count Two until he had reviewed the immigration file, the government offered to dismiss Count Two and to proceed to trial the next day on Count One alone. The court conditioned its denial of

respondent's continuance motion upon dismissal of Count Two (Tr. 18, 23, 25-26).

In denying respondent's motion for a 30-day continuance, the district court relied substantially on the Seventh Circuit's decision in *Horton* and distinguished *Arkus* on factual grounds (Tr. 23-25). The court also emphasized that respondent was not in any respect prejudiced by being required to go to trial on the superseding indictment (Tr. 24-25):

> [T]he first issue before the court is whether or not there is any prejudice that has been shown by virtue of him going to trial on the superceding [*sic*] indictment on which he was just arraigned this morning. In other words, is the change of date in Count 1 so significant and causes a significant problem. I see none.
>
> To the extent that it appears that the discovery was very clear, the date that was being discussed is the date of the indictment, and therefore certainly the basis for their felony, and the prior act was clear from the discovery and clear from the inception. So it was a ministerial act to correct a date error where a "1" had been inserted in error, and that has been corrected by the superceding [*sic*] indictment. So I find that there has been no change—I mean, no prejudice from the superceding [*sic*] indictment.

3. The court of appeals reversed, holding that under its decision in *United States* v. *Harris*, 724 F.2d 1452 (1984), which in turn relied on *Arkus*, respondent was entitled to a new 30-day defense preparation period following his arraignment on the superseding indictment (App., *infra*, 2a). The court of appeals rejected the government's argument that, because the superseding indictment merely corrected a typo-

graphical error of which defense counsel was already aware, no new defense preparation period was required. The court commented only on the government's observation that the original indictment could have been amended without resubmitting the case to the grand jury, describing this circumstance as "immaterial," and stating (App., *infra*, 2a): "It was the government who chose to proceed by way of reindictment." Finally, citing its decision in *United States* v. *Daly*, 716 F.2d 1499, 1506 (1983), the court of appeals held that reversal of respondent's conviction was the automatic consequence of the Speedy Trial Act violation (App., *infra*, 2a):

> [A]ny pretrial preparation period shorter than thirty days is inadequate *per se*. No showing of prejudice is required.

4. The government filed a petition for rehearing and suggestion of en banc review.[3] One or more active members of the court requested a poll of the full court, but the suggestion for rehearing en banc was rejected by a majority vote (App., *infra*, 5a).

REASONS FOR GRANTING THE PETITION

This case presents a question of considerable practical importance for the administration of the Speedy Trial Act and the effective management of the substantial criminal dockets of the United States District Courts. The decision of the court of appeals is contrary to the pertinent language of the Speedy Trial Act and contrary to the decisions of every other

[3] A short time earlier the government had filed a petition for panel rehearing in *Harris*, which thereafter was denied.

court of appeals to consider the question presented—by now a total of four circuits. It injects a wholly irrational requirement of delay that defeats the congressional policy underlying the Speedy Trial Act and could not possibly have been intended in cases like this. Further review is warranted here.

1. a. As originally enacted, Title I of the Speedy Trial Act of 1974, 18 U.S.C. 3161 *et seq.*, established only outside time limits within which a criminal case must be tried. See 18 U.S.C. (1976 ed.) 3161(c). Generally speaking, the rule established by the *speedy* trial provisions of the Act is that trial must commence witnin 70 days following indictment or arraignment, whichever occurs later. 18 U.S.C. 3161(c)(1). However, in counting the 70 days, time elapsed during various predictable and unpredictable pretrial proceedings is to be excluded. 18 U.S.C. 3161(h). The Act set no limit on the degree of expedition permitted.

In 1979, however, Congress amended the Act to "assure[] the defendant some minimal time to prepare." S. Rep. 96-212, 96th Cong., 1st Sess. 32 (1979). See *United States* v. *Mers*, 701 F.2d 1321, 1333 (11th Cir. 1983). Except in cases where "the defendant consents in writing to the contrary," Section 3161(c)(2), added by the 1979 amendments, prohibits the commencement of trial "less than thirty days from the date on which the defendant *first appears through counsel* * * *" (emphasis added). Thus, under the language of the statute, the mandatory 30-day trial preparation period began for respondent on February 18, 1983, and ended on March 20, 1983. See *United States* v. *Darby*, 744 F.2d 1508, 1520 (11th Cir. 1984) ("When employing the term

'first,' Congress presumably did not have *subsequent* appearances in mind [emphasis in original].").

There is nothing in either the statute or its legislative history that supports the court of appeals' holding that a new 30-day defense preparation period must be allowed following a defendant's arraignment on a superseding indictment. See generally, A. Partridge, *Legislative History of Title I of the Speedy Trial Act of 1974*, at 69-75 (Fed. Judicial Center 1980). Indeed, examination of other provisions in the Act confirms that Congress did not intend the return of a superseding indictment automatically to trigger a new defense preparation period. As the Seventh Circuit noted in *United States* v. *Horton*, 676 F.2d 1165, 1169 (1982), cert. denied, 459 U.S. 1201 (1983), Section 3161(d)(1) provides that when an indictment is dismissed "upon motion of the defendant" and a subsequent indictment is filed charging the defendant with the same offense or a related offense, the constraints governing the timing of trial established by Section 3161(c) take effect with respect to the subsequent indictment. Thus, when reindictment follows grant of a defendant's motion to dismiss, the government is allowed a new period of 70 nonexcludable days to bring the defendant to trial and the defense is afforded a new 30-day trial preparation period. By contrast, Section 3161(d)(1) makes no provision for restarting of the Speedy Trial Act time limits when a superseding indictment is returned and the government voluntarily dismisses an earlier indictment,[4] and no other provision of the Act provides for a new 30-day period in that situation.

---

[4] It is clear that this omission does not result from a legislative oversight. Section 3161(d)(1) retriggers the 30- and

Act

Section 3161(h)(6) of the Speedy Trial Act confirms that this distinction is, indeed, a deliberate one. See also note 4, *supra*. That section provides that when an indictment is dismissed upon the government's motion, the period between that dismissal and arraignment upon a subsequent indictment is not to be counted against the 70-day period within which trial must be held. In requiring exclusion of the time when a defendant is not held to answer on any indictment, Congress plainly assumed that the time within which a defendant must be brought to trial on a subsequent indictment is measured from his arraignment on the *original* indictment, subject to the tolling rule created by Section 3161(h)(6). And the courts that have considered the issue have uniformly agreed that reindictment after a voluntary dismissal does not trigger a new 70-day period for trial. Thus, when dismissal is on the government's own motion and there is no gap between dismissal and reindictment (so that Section 3161(h)(6) is not directly controlling), the government's 70-day time limit is computed directly by reference to the date of the original arraignment. See *United States* v. *Bounos*, 730 F.2d 468, 470 (7th Cir. 1984); *United States* v. *Rodriguez-Restrepo*, 680 F.2d 920, 921 (2d Cir. 1982); *United States* v. *Horton*, 676 F.2d at 1170; *United States* v. *Dennis*, 625 F.2d 782, 793 (8th Cir. 1980); cf. *United States* v. *MacDonald*, 456 U.S. 1, 21 n.7 (1982).

70-day time limits upon refiling of charges following dismissal of a *complaint*, regardless of which party is responsible for the dismissal, whereas new time limits are triggered by renewed filing of charges after dismissal of an *indictment* only when the dismissal is "upon motion of the defendant" (18 U.S.C. 3161(d)(1)).

The same rule should apply to the 30-day minimum defense preparation period. *United States* v. *Rush*, 738 F.2d 497, 511 (1st Cir. 1984). The Committee on the Administration of the Criminal Law of the Judicial Conference of the United States has recognized as much in its *Guidelines to the Administration of the Speedy Trial Act of 1974, As Amended*, at 14 (rev. 1979, with Aug. 1981 amendments):

> In the opinion of the Committee, the [defense-preparation] period does not begin to run anew when superseding indictments are filed in circumstances in which the seventy-day time limit is determined by reference to the original indictment or information. See Section 3161(h)(6). Nor does a new thirty-day minimum period begin to run if prosecution is resumed on an original indictment or information following a mistrial, appeal, or withdrawal of a guilty plea. In all of these situations, the trial court should use its scheduling discretion to ensure that the defense has time to prepare in the circumstances of the particular case.[5]

Indeed, unless the 30-day minimum period and the 70-day maximum period for trial begin to run at the same time, a paradox ensues: a timely trial may be impossible where a superseding indictment is returned more than 41 days after filing of the original indictment; in that situation, by the time the 30-day period is allowed to accrue, the 70-day period will have elapsed. Indeed, this case presents precisely the paradox we have noted.[6]

[5] The 1984 revision of these guidelines, which we received just prior to filing of this petition, adds the observation that the Ninth Circuit's interpretation of Section 3161(c)(2) is, in this respect, contrary to the Committee's view. Comm. on the Administration of the Criminal Law of the Judicial Conference of the United States, *Guidelines to the Administration of the Speedy Trial Act of 1974, As Amended*, at 15-16 (rev. 1979, with amendments through Oct. 1984).

b. Although the court of appeals took no notice of this fact, there are two separate provisions in the Act that tend to ensure that defendants will have adequate time to prepare for trial. The first is Section 3161(c)(2), the operation of which is directly at issue here. As we have explained, that section guarantees that, absent an express waiver, a defendant and his attorney will have at least one 30-day period in which to prepare for trial. But in providing for this "automatic" 30-day trial preparation period in 1979, Congress recognized that additional preparation time would be needed in some cases. Thus Congress also amended the Act to permit the district court, in the sound exercise of its discretion, to order an "ends of justice" continuance under Section 3161(h)(8) when needed, inter alia, to afford

[6] The original indictment was filed on February 18, 1983 and respondent was arraigned the same day. Fifty-six days later, the superseding indictment was filed. No pretrial motions were filed in this case and other pretrial proceedings (filing of the indictment and the re-arraignment) that create time excludable from the 70-day Speedy Trial Act time limit under 18 U.S.C. 3161(h) account for only two days. Accordingly, only 16 days then remained in which to commence respondent's trial. Respondent was arraigned on the superseding indictment on April 18, 1983. If respondent had then been given a new 30-day preparation period, his trial could not have begun until May 18, 1983, 17 days after the 70-day time limit had expired. Under the applicable sanctions provision of the Act, 18 U.S.C. 3162(a)(2), respondent would have been entitled to a dismissal of the indictment—albeit not necessarily with prejudice—because his trial was tardy.

defense counsel "reasonable time necessary for effective preparation." 18 U.S.C. 3161(h)(8)(B)(iv); see *United States* v. *Aviles*, 623 F.2d 1192, 1196 (7th Cir. 1980).

The latter provision gives the Act necessary flexibility and will adequately protect a defendant who legitimately needs more time to prepare for trial because of the filing of a superseding indictment (or any other reason), and who makes a properly supported application for such a continuance to the district court. Accordingly, there is no reason to extend the application of the automatic 30-day preparation period beyond the circumstances specified by Section 3161(c)(2).

Superseding indictments are regularly and appropriately employed by federal prosecutors for such purposes as correcting errors in the original indictment (as in this case), conforming the indictment to the evidence expected to be adduced at trial, dropping defendants or counts, and like purposes that often will have no material bearing upon the ability of a defendant who has already had at least 30 days' preparation time to be ready for trial. The requirement created by the Ninth Circuit of an automatic additional 30-day delay in the trial is not only unnecessary to protect defendants' interests, but can cause severe disruption of the crowded dockets of district courts, inconvenience to witnesses, and conflicts among defendants in multi-defendant cases in which some defendants demand a prompt and speedy trial as scheduled while other insist upon an automatic 30-day delay. The Ninth Circuit's rule is at bottom fundamentally inconsistent with the purposes of the Speedy Trial Act, which, as its name implies,

is designed for the expeditious resolution of criminal prosecutions and the avoidance of unnecessary delay in achieving that objective. It should be corrected by this Court.

c. The result reached by the court of appeals is particularly indefensible because of the nature of the change effected by the filing of the superseding indictment in this case. As we have explained (pages 4-5, *supra*), the superseding indictment merely corrected a typographical error as to the date of conviction upon a predicate offense. Respondent and his counsel had every reason to know, from the outset, the correct date of the predicate conviction, and he has never claimed that the typographical error was the cause of any difficulty in preparing for trial.[7] Moreover, it is undisputed that counsel was advised of the correct date of the conviction on the predicate offense long in advance of the scheduled trial date. As the facts of this case highlight, the policy of allowing adequate time for defendants to prepare for trial generally does not require continuance of trial following return of a superseding indictment. It is inconceivable, in light of the purposes of the Speedy Trial Act, that Congress intended rigidly to require an automatic 30-day postponement of trial in these circumstances.

d. As Justice White has observed, *Williford* v. *United States*, No. 83-6814 (Oct. 9, 1984) (dissent from denial of certiorari), the question that is pre-

---

[7] In point of fact, neither the original indictment nor the superseding indictment purported to state precisely the date of the predicate conviction. Rather, the original indictment stated that the prior judgment of conviction was entered "on or about December 17, 1981," whereas the superseding indictment substituted the phrase "on or about December 7, 1981" (E.R. 4, 7).

sented here has divided the courts of appeals. The rule developed by the Ninth Circuit conflicts with the decisions of every other court of appeals that has considered the issue. See *United States* v. *Rush*, 738 F.2d 497, 510-511 (1st Cir. 1984) (expressly disagreeing with the Ninth Circuit's decisions in *Arkus* and *Harris*); *United States* v. *Williford*, No. 83-1376 (5th Cir. Feb. 27, 1984), slip op. 3-6, cert. denied, No. 83-6814 (Oct. 9, 1984); *United States* v. *Horton*, 676 F.2d 1165, 1169 (7th Cir. 1982), cert. denied, 459 U.S. 1201 (1983); *United States* v. *Todisco*, 667 F.2d 255, 260 (2d Cir. 1981).[8] In opposing certiorari in *Williford* (83-6814 Br. in Opp. 4-5) we conceded that the decision in this case was irreconcilable with those of other courts of appeals concerning this issue, but noted the pendency of our petition for rehearing with suggestion for en banc review and suggested that this Court should withhold review until it was clear that the Ninth Circuit would adhere to its position.[9] Now that the Ninth Circuit has made

[8] In dissenting from the denial of certiorari in *Williford*, Justice White appeared to suggest that the Fourth Circuit had allied itself with the Ninth Circuit on the question presented here, citing *United States* v. *Wooten*, 688 F.2d 941, 951 (1982). We do not read *Wooten* to address the question at all. The issue in *Wooten* was whether the defense-preparation period is measured by 30 calendar days or whether the period is subject to expansion by periods of excludable delay. 688 F.2d at 949-951. There was no superseding indictment in *Wooten*, and the court did not comment on the applicability of Section 3161(c)(2) to superseding indictments.

[9] Our brief in *Williford* was filed on July 30, 1984. Although the court of appeals denied our rehearing petition in this case shortly before this Court denied certiorari in *Williford*, we were not aware of that fact, and did not become so until we asked the U.S. Attorney to call this Court's action in *Williford* to the attention of the court of appeals in connection with the rehearing petition in this case.

clear its unwillingness to reconsider the issue, further review plainly is warranted. Although several of the courts of appeals have suggested that there might be some circumstances in which a superseding indictment requires a continuance of a trial date (see, *e.g.*, *United States* v. *Rush*, 738 F.2d at 511), it is perfectly clear that the First, Second, Fifth, and Eighth Circuits would have rejected respondent's argument that the Speedy Trial Act was violated here.

2. Even if the defense preparation period requirement of the Speedy Trial Act was violated here, the court of appeals' further ruling (App., *infra*, 2a) that a violation of Section 3161(c)(2) is "per se" reversible error and that respondent accordingly is entitled to a new trial here is plainly erroneous. In *United States* v. *Hasting*, 461 U.S. 499, 509 (1983), this Court reaffirmed "the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless, including most constitutional violations * * *." See 28 U.S.C. 2111; Fed. R. Crim. P. 52(a). The decision below thus is inconsistent with the general rule that any adjudication of error be accompanied by a harmless error analysis.

Nothing in the Speedy Trial Act precludes application of the harmless error rule to violations of Section 3161(c)(2). The Act itself contains a variety of remedial prescriptions, but none of these provides any sanction for violations of Section 3161(c)(2). For instance, Section 3162(a)(1) requires dismissal of pending charges if the arrest-to-indictment time limit established by Section 3161(b) is violated, and Section 3162(a)(2) mandates dismissal of an indictment when a defendant is not brought to trial within the period established by Section 3161(c)(1). (Such dismissals may be with or without prejudice, as the circumstances of the violation and other statu-

tory considerations dictate.) Section 3162(b) prescribes disciplinary sanctions for attorneys who knowingly subvert the purposes served by the Speedy Trial Act. And when a defendant is incarcerated for more than 90 non-excludable days before commencement of his trial, the statute prescribes "automatic review by the court of the conditions of release" as the proper remedy (18 U.S.C. 3164(c)). In light of Congress's failure even to address the sanction to be imposed for violation of 18 U.S.C. 3161(c)(2), it is plainly inappropriate to suppose that Congress meant to abrogate the harmless error rule in this situation.

The Ninth Circuit has itself recognized that the Act does not specify the remedy, if any, for a violation of Section 3161(c)(2). *United States* v. *Daly*, 716 F.2d 1499, 1505-1506 (1983) ("The Act provides no specific guidance as to the appropriate remedy * * * [where a case is tried earlier than is permitted by section 3161(c)(2)]."). But in *Daly*, which the panel in this case followed (App., *infra*, 2a), the court of appeals filled the gap in the statutory language, holding that a new trial is the proper remedy, and apparently excluding consideration of harmless error (716 F.2d at 1506):

> [T]he purpose of section 3161(c)(2) is to insure that defendants are allowed sufficient time to prepare for trial. Consistent with this underlying policy, section 3161(c)(2) essentially establishes that any pretrial preparation period shorter than 30 days is inadequate *per se*. A violation of Section 3161(c)(2) thus should be treated like an erroneously denied motion for a continuance, because both of these procedural errors deny a defendant a fair trial by forcing him into court before he has had adequate time for preparation.

The analogy employed by the court of appeals is faulty and misleading. To be sure, Section 3161(c)(2) reflects Congress's judgment that the specified period of trial preparation time should be permitted by district courts, without regard to whether failure to do so would in a particular case be unfairly prejudicial, or would deny a defendant due process. The automatic feature of Section 3161(c)(2) thus ordinarily makes it unnecessary and inappropriate for the district courts to engage in a fact-sensitive determination as to the defendant's need for time to prepare a defense. Accordingly, it is *error* to deny the 30-day trial preparation period when required by the Act. But it does not follow that such an error may not be harmless.

Nor does the analogy to an "erroneously denied continuance" support the court of appeals' conclusion here. When not directed otherwise by the Speedy Trial Act, trial courts have considerable discretion as to whether a continuance sought by a defendant should be granted. See *United States* v. *Cronic*, No. 82-660 (May 14, 1984), slip op. 13. Thus, a ruling on the merits that discretion has been abused and that denial of a continuance was therefore "erroneous" necessarily imports a determination that the ruling, and thus the error, was prejudicial. On the other hand, precisely because a violation of Section 3161(c)(2) does not depend upon any showing of prejudice, finding such a violation does not rule out the possibility of harmless error. To be sure, an appeal based on a violation of Section 3161(c)(2) does not require the defendant affirmatively to demonstrate prejudice flowing from the curtailment of pretrial preparation time. But this does not prevent the government from shouldering the burden of demonstrating harmless error.

Assuming that the government may avoid reversal by successfully carrying the burden of establishing harmless error under Section 3161(c)(2), the error in this case must be deemed undeniably harmless. As we have explained above (page 15), there is no conceivable basis for claiming (and respondent has never claimed) that the typographical error in the original indictment in any way impeded his trial preparation, or that the return of the superseding indictment correcting that error, which had affirmatively been disclosed to respondent almost a month earlier, disrupted that preparation. Accordingly, respondent, who was afforded 60 days of preparation time from arraignment to trial, suffered no possible injury from any technical violation of the Act that may have occurred here.[10] Thus any such violation should have been deemed harmless and the respondent's conviction should have been affirmed.

3. The rule developed by the court of appeals and applied in this case will have a considerable adverse effect on the administration of the criminal law

[10] As the government observed in the court of appeals, it is well-settled in the Ninth Circuit that an indictment may be "amended" to correct typographical errors, without resubmitting the case to the grand jury for reindictment. See, *e.g.*, *United States* v. *Dawson*, 516 F.2d 796, 801 (1975); *United States* v. *Buble*, 440 F.2d 405, cert. denied, 404 U.S. 828 (1971); *Heisler* v. *United States*, 394 F.2d 692, cert. denied, 393 U.S. 986 (1968). Even had there been no actual amendment of the indictment by the court, trial on the original indictment would have involved at most an immaterial, and therefore non-prejudicial, variance between the indictment and the proof that would not have justified setting aside respondent's conviction. It is no answer, at least in the context of a harmless error analysis, to observe, as the court of appeals did, that the government is bound by its decision to seek reindictment.

within the Ninth Circuit. We have already noted that it may make it difficult or impossible to avoid Speedy Trial Act violations in an important category of cases. But even where that problem does not exist, the court of appeals' interpretation of the Act will disrupt the management of heavily burdened district court dockets by throwing cases off the calendar whenever a superseding indictment is returned, even when there is no legitimate need for a continuance. Moreover, the filing of superseding indictments relatively late in the pretrial period is an ordinary and natural consequence of pretrial proceedings that focus or limit the charges to be tried. Defendants, prosecutors, the courts, and the public interest would be disserved if an artificial impediment to filing of superseding indictments were created; yet that may well be the practical effect of the court of appeals' decision. Accordingly, the decision of the court of appeals ought not go unreviewed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

ANDREW L. FREY
Deputy Solicitor General

JOSHUA I. SCHWARTZ
Assistant to the Solicitor General

PATTY MERKAMP STEMLER
Attorney

DECEMBER 1984

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 83-5089

DC No. CR 83-0162-K

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

vs.

FERNANDO ROJAS-CONTRERAS, DEFENDANT-APPELLANT

Appeal from the United States District Court
for the Southern District of California
Judith N. Keep, District Judge, Presiding

Submitted January 3, 1984**
[Filed Mar. 2, 1984]

MEMORANDUM*

Before: TANG, FERGUSON and BOOCHEVER, Circuit Judges.

---

* The panel has concluded that the issues presented by this appeal do not meet the standards set by Rule 21 of the Rules of the Ninth Circuit for disposition by written opinion. Accordingly, it is ordered that disposition be by memorandum, forgoing publication in the *Federal Reporter*, and that this memorandum may not be cited to this court as precedent.

** The panel unanimously agrees that this case is appropriate for submission without oral argument.

Rojas-Contreras appeals his conviction of felony illegal reentry on the ground that the district court erred in denying his request for a thirty-day continuance under the Speedy Trial Act, 18 U.S.C. § 3161 (c) (2), after Rojas-Contreras was arraigned on a superseding indictment. We agree and therefore reverse his conviction.

In *United States v. Harris*, No. 83-5051, slip op. at 562 (9th Cir. Feb. 3, 1984), we held that section 3161(c) (2) of the Speedy Trial Act guarantees that a defendant will not be forced to trial less than thirty days from the date on which the defendant first appears on the indictment on which the defendant ultimately goes to trial. Rojas-Contreras was thus entitled to an additional thirty-day preparation period after he was arraigned on the superseding indictment. Further, any pretrial preparation period shorter than thirty days is inadequate *per se*. No showing of prejudice is required. *Id.*; *United States v. Daly*, 716 F.2d 1499, 1506 (9th Cir. 1983) ("A violation of section 3161(c) (2) thus should be treated like an erroneously denied motion for a continuance, because both of these procedural errors deny a defendant a fair trial by forcing him into court before he has had adequate time for preparation.").

The government's argument that the original indictment may have been amended without resubmitting the case to the grand jury is immaterial. It was the government who chose to proceed by way of reindictment.

Rojas-Contreras was forced to trial less than thirty days after he was arraigned on the superseding indictment in violation of the Speedy Trial Act. His conviction is

REVERSED.

APPENDIX B

[Tr. 23-25]:

THE COURT: Let me point out to you that, number 1, the way I read Arcus is that essentially, well, essentially the Speedy Trial Act itself says something to the effect that absent a waiver no trial may commence within 30 days of the defendant's first appearance by counsel.

Now, in the language in Arcus that this talked about the fact that they can't have [trial] within 30 days of the indictment without express waiver, and then they do in fact talk about in this particular case the fact that the first indictment be dismissed, delay before the second one, et cetera.

The factual distinction that I see is, and I am rather relying on the Seventh Circuit, regardless of whether you believe that your old presiding judge's concurring opinion is correct or not. The point is to make sure that the defendant is not forced to trial too fast; yet, on the other hand, the Speedy Trial Act is my guidelines, my rules as to when I would have to get a defendant to trial.

In fact, the first issue before the Court is whether or not there is any prejudice that has been shown by virtue of him going to trial on the superseding indictment on which he was just arraigned this morning. In other words, is the change of date in Count 1 so significant and causes a significant problem. I see none.

To the extent that it appears that the discovery was very clear, the date that was being discussed is the date of the indictment, and therefore certainly the basis for their felony, and the prior act was clear from the discovery and clear from the inception. So

it was a ministerial act to correct a date error where a "1" had been inserted in error, and that has been corrected by the superceding indictment. So I find that there has been no change—I mean, no prejudice from the superceding indictment.

Then the question is, looking at Arcus and looking at the Seventh Circuit's case that was decided, in this particular case there was an overlap. That was arraigned on the superceding indictment this morning, and the original indictment was dismissed. He has been in custody since the date, I believe, of his arrest, which was what, according—

MR. CLEARY: I think 13 February, Your Honor.

THE COURT: 13 February 1983; therefore we don't have a situation like Arcus where the case was dismissed, the individual is out, and presumably free, and the counsel is not preparing. He's going on with other business. But rather it is a matter of in this case there's been this trial date set, and there's been the constant contact between counsel and the defendant since his arrest.

The second thing that I see, then, is on the issue of prejudice. What is being discussed with the court really doesn't have to do with changing the indictment at all, but the fact that the "A" file has not been prepared. * * *

* * * * *

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 83-5089

DC No. CR 83-0162-K

Southern California

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

FERNANDO ROJAS-CONTRERAS, DEFENDANT-APPELLANT

[Filed Sept. 26, 1984]

ORDER

Before: TANG, FERGUSON and BOOCHEVER, Circuit Judges.

The panel as constituted in the above case has voted unanimously to deny the petition for rehearing.

The full court has been advised of the suggestion for an en banc hearing and a judge in active service requested that a vote be taken on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

Upon vote of the eligible judges in active service, a majority failed to vote for an en banc rehearing.

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1984 461531 10122

No. 84-1023

Office-Supreme Court, U.
FILED
JAN 28 1985
ALEXANDER L. STEVAS
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

UNITED STATES OF AMERICA, PETITIONER

v.

FERNANDO ROJAS-CONTRERAS

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR FERNANDO ROJAS-CONTRERAS IN OPPOSITION

JUDY CLARKE
Federal Defenders of San Diego, Inc.
101 W. Broadway, Suite 440
San Diego, California 92101-8297
Telephone (619) 234-8467

Attorneys for Respondent

QUESTIONS PRESENTED

1. Whether the 18 April 1983 arraignment of respondent under a superseding indictment filed by the government on 15 April 1983 activated the provisions of the Speedy Trial Act, 18 U.S.C. § 3161(c)(2) which prohibited commencement of trial within 30 days of arraignment without the written consent of respondent?

2. Whether the completion of the sentence imposed upon respondent and his return to Mexico renders the case moot?

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

No. 84-1023

UNITED STATES OF AMERICA, PETITIONER

v.

FERNANDO ROJAS-CONTRERAS

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR FERNANDO ROJAS-CONTRERAS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is unreported. The oral ruling of the trial court which denied the demand of respondent that his trial not commence within 30 days of his 18 April 1983 arraignment under the superseding indictment is unreported.

JURISDICTION

The judgment of the court of appeals was entered on 2 March 1984. (Pet. App. 1a-2a). On 26 September 1984 petition for rehearing was denied (Pet. App. 5a). On 17 November 1984 the time within which to file a petition for a writ of certiorari was extended by Justice Rehnquist to and including 26 December 1984. On 26 December 1984 the petition for a writ of certiorari was filed. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

18 U.S.C. § 3161(c)(1): In any case in which a plea of

not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs....

18 U.S.C. § 3161(c)(2): Unless the defendant consents in writing to the contrary, the trial shall not commence less than thirty days from the date on which the defendant first appears through counsel or expressly waives counsel and elects to proceed pro se.

STATEMENT

On 18 February 1983 a two-count indictment was filed in the United States District Court for the Southern District of California, charging respondent with felony illegal entry into the United States in violation of 8 U.S.C. § 1325 and being found in the United States after having been deported, in violation of 8 U.S.C. § 1326 [C.R.3].[1/] Count One charged respondent with entering the United States illegally on or about 13 February 1983 after having been convicted of entering the United States illegally, which conviction occurred on or about 17 December 1981 [C.R. 3] Trial was scheduled for 19 April 1983.

On 18 April 1983 respondent was arraigned on a superseding indictment filed 15 April 1983. The 15 April 1983 superseding indictment charged felony illegal entry into the United States and having been found in the United States after having been deported [C.R. 8]. However, Count One of the superseding indictment charged respondent with having entered the United States illegally on or about February 13, 1983 after having been convicted of entering the United States illegally, which conviction occurred on or about 7 December 1981 [C.R. 8].

At the 18 April 1983 proceedings counsel for the government requested that respondent be arraigned on the superseding indictment. When the court inquired if counsel who had been appointed to represent respondent had received a copy, appointed-counsel acknowledged the receipt of a copy and waived further reading of the indictment [R.T. 5] [2/] The court then informed respondent that a superseding indictment had been filed charging him with felony illegal entry and being

1/ "C.R." refers to the Clerk's Record.
2/ "R.T." refers to the Reporter's Transcript.

a deported alien found in the United States. The court (clerk) also advised respondent that he was entitled to have a trial by jury, to be represented by counsel at all stages of the proceedings, and to have witnesses summoned to testify in his behalf. Respondent then entered a not guilty plea to each of the two counts [R.T. 5-6].

The court then stated: "Okay. This matter is set for trial tomorrow" [R.T. 6]. Counsel for respondent, citing the decision of the Ninth Circuit Court of Appeal in United States v. Arkus, 675 F. 2d 245 (9th Cir. 1982), and its interpretation of 18 U.S.C. § 3161(c)(2), entered a demand that trial not commence for 30 days [R.T. 6, 9]. The demand that the trial not commence for 30 days from the arraignment under the 15 April 1983 superseding indictment was denied [R.T. 23-25, Pet. App. B, 3a-3b].

On 19 April 1983 trial commenced under Count One of the 15 April 1983 indictment. Respondent was convicted and the court of appeals reversed without oral argument in a 2 March 1984 unpublished memorandum [Pet. App. A, 1a-1b]. The court below held that respondent was under the Speedy Trial Act [§ 3161(c)(2)] entitled to 30 days from the date on which he first appeared under the indictment on which he ultimately went to trial and that any pretrial preparation period shorter than thirty days was inadequate per se [Pet. App. A at 2a].

ARGUMENT

1. The 18 April 1983 arraignment of respondent under the superseding indictment filed by the government on 15 April 1983 activated the provisions of the Speedy Trial Act, 18 U.S.C. § 3161 and prohibited commencement of trial within 30 days of arraignment without the written consent of respondent.

In its enactment of the Speedy Trial provisions Congress unequivocally provided:

> In any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs..... 18 U.S.C. § 3161(c)(1).

It is not disputed that the superseding indictment in this

case was filed on 15 April 1983 and that respondent was arraigned and entered a not guilty plea on 18 April 1983 just one day prior to the date that trial had been scheduled under the 18 February 1983 indictment.

Title 18, U.S.C. § 3161(c)(1) provides: "In any case in which a plea of not guilty is entered...." Here the "not guilty" plea of respondent was entered on 18 April 1983. While that "not guilty" plea was to the superseding indictment filed by the government on 15 April 1983, the language of Congress does not distinguish between a "not guilty" plea to an information, indictment, or superseding indictment. Consequently, the 18 April 1983 "not guilty" plea of respondent was within the ambit of a "not guilty" plea entered "In any case" as set forth by Congress under § 3161(c)(1).

Congress further provided:

> "Unless the defendant consents in writing to the contrary, the trial shall not commence less than thirty days from the date on which the defendant first appears through counsel or expressly waives counsel and elects to proceed pro se." 18 U.S.C. § 3161(c)(2).

Prior to the entry of the "not guilty" plea by respondent on 18 April 1983, he was advised, inter alia, that he was entitled to be represented by counsel at all stages of the proceedings. He was not advised that he had the right to waive counsel and proceed pro se. Had respondent been advised of his right to waive counsel, he could have done so and proceeded pro se. He then would have been entitled to not have his trial commence for less than thirty days from that date under § 3161(c)(2).

Here, however, previously appointed counsel invoked the provisions of § 3161(c)(2) that the trial not commence less than 30 days from the 18 April 1983 "not guilty" plea [R.T. 6, 9]. That request was denied and trial commenced the following day [R.T. 23-25, 33]. Although court-appointed counsel had appeared for respondent prior to the 18 April 1983 arraignment and "not guilty" plea, that appearance was not under the 15 April 1983 superseding indictment.

As the court below held, respondent was entitled to 30 days from the date of his 18 April 1983 arraignment and "not guilty" plea. Section 3161(c)(2) provided him that right. The Fourth Circuit Court of Appeals has said of § 3161(c)(2):

> "What section 3161(c)(2) does is simply to guarantee to the criminal defendant the right to a delay of at least 30 days between arraignment and trial in any circumstances. This guarantee is in addition to or supplementary to any other rights that the defendants may have under recognized principles for a continuance beyond those thirty days as given him by § 3161(c)(2)." United States v. Wooten, 688 F.2d 941, 951 (4th Cir. 1982).

Here respondent entered his "not guilty" plea on 18 April 1983 and was tried the following day under the superseding indictment filed by the government on 15 April 1983. Respondent had been represented by counsel under the previous indictment. However, he first appeared through counsel under the superseding indictment on 18 April 1983. Consequently, he was entitled to have his trial not commence for less than thirty days from 18 April 1983.

2. The completion of the sentence imposed upon respondent and his return to Mexico renders the case moot as to him.

In Lane v. Williams, 455 U.S. 624 (1982), this Court discussed two exceptions to the mootness doctrine: The "collateral consequences" exception and the exception which arises from violations which are "capable of repetition, yet evading review." This case falls outside those exceptions. Respondent has served fully the sentence imposed upon him in this case.

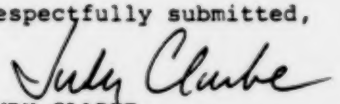
It cannot be said that the government will suffer any type of collateral consequences or that the issue presented in the petition for the government is "capable of repetition, yet evading review." See Williford v. United States, ___U.S.___, 105 S. Ct. 270 (1984), denying cert., where the question of the renewal period under § 3161(c)(2) was presented. Although Williford v. United States involved certiorari sought by the defendant, the issue was the same as in the instant case where it is the government who seeks certiorari.

Here, also, the government has returned the Respondent to Mexico after the completion of the sentence imposed in the instant case. The same doctrine of mootness enunciated in Lane v. Williams should apply to the instant case.

CONCLUSION

For the foregoing reasons, respondent respectfully submits that the petition for writ of certiorari should be denied.

Respectfully submitted,



JUDY CLARKE
Federal Defenders of San Diego, Inc.
101 West Broadway, Suite 440
San Diego, California 92101-8297
Telephone: (619) 234-8467

Attorneys for Respondent

Office - Supreme Court, U.S.
FILED
FEB 11 1985
ALEXANDER L. STEVAS
CLERK

No. 84-1023

In the Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA, PETITIONER

v.

FERNANDO ROJAS-CONTRERAS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

Page

Cases:

Fiswick v. *United States*, 329 U.S. 211 4

Lane v. *Williams*, 455 U.S. 624 ..... 2, 3

Pennsylvania v. *Mimms*, 434 U.S. 106 ..... 3, 4, 5

Sibron v. *New York*, 392 U.S. 40 3

United States v. *Villamonte-Marquez*, No. 81-1350 (June 17, 1983) 4

United States v. *Wooten*, 688 F.2d 941 1

Statutes:

Speedy Trial Act, 18 U.S.C. 3161 *et seq.* :

18 U.S.C. 3161(c)(1) 2
18 U.S.C. 3161(c)(2) 1, 2
18 U.S.C. 3161(d)(1) 2

8 U.S.C. 1325 4

8 U.S.C. 1326 4

18 U.S.C. 3575 3

18 U.S.C. App. 1202(a)(1) 4

In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-1023

UNITED STATES OF AMERICA, PETITIONER

v.

FERNANDO ROJAS-CONTRERAS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

Respondent's arguments in opposition to further review in this case are insubstantial.

1. Respondent makes little effort to respond to our construction of the Speedy Trial Act. He disregards, inter alia, the language of Section 3161(c)(2), the other provisions of the Act with which it must be read, and the decisions of the First, Second, Fifth, and Seventh Circuits that are contrary to the decision below.[1] Only two points need be added to what we have already said in the petition regarding the merits of the question presented.

---

[1]Respondent's reliance (Br. in Opp. 5-6) on *United States* v. *Wooten*, 688 F.2d 941, 951 (4th Cir. 1982), is misplaced. Read in context the language he quotes lends no support to his contentions. See Pet. 16 n.8.

First, respondent implies (Br. in Opp. 4-5) that, under 18 U.S.C. 3161(c)(1), the government was entitled to a new 70-day period following his arraignment on the superseding indictment within which to bring him to trial. Respondent apparently reasons that he accordingly was entitled to a new 30-day defense preparation period. We agree that the same rule generally should govern restarting of the Speedy Trial Act clock for purposes of both the 30-day minimum and 70-day maximum trial date provisions in this situation. See Pet. 12-13 & n.5. But respondent's other premise is false. As Section 3161(d)(1) makes clear, notwithstanding the return of the superseding indictment, the government was *not* entitled to a new 70-day period in which to bring respondent to trial here. See Pet. 10-11 & n.4. Accordingly, respondent's analogy to Section 3161(c)(1) is unavailing.

Second, respondent appears to suggest (Br. in Opp. 5) that if he had elected to proceed pro se following the return of the superseding indictment he would have been allowed a new 30-day trial preparation period. This is plainly an incorrect reading of Section 3161(c)(2). While a decision to discharge counsel and proceed pro se might well occasion a continuance in the trial court's discretion, it would not force the court to continue the case automatically under Section 3161(c)(2). See Pet. 13-14. A defendant whose trial commences not "less than thirty days from the date on which [he] *first* appears through counsel" (18 U.S.C. 3161(c)(2) (emphasis added)) is not entitled automatically to a second 30-day preparation period following his election to proceed pro se. In any event, even if our reading of Section 3161(c)(2) were in this respect incorrect, it does not follow that respondent, who was represented by the same lawyer throughout, was entitled to a new trial preparation period.

2. Citing *Lane* v. *Williams*, 455 U.S. 624 (1982), respondent claims (Br. in Opp. 6) that the completion of his sentence and his ensuing departure from the United States render this case moot. This contention is incorrect.

We emphasize at the outset that this case arises on respondent's direct appeal from the judgment of conviction entered in his case. Accordingly, the policy that influences the standard for determining mootness in this context differs from that applicable to a collateral challenge to a final judgment. See *Lane* v. *Williams*, 455 U.S. at 633 n.13 ("Collateral review of a final judgment is not an endeavor to be undertaken lightly."). It is doubtful that a defendant's direct appeal from a felony conviction should ever be deemed moot as a result of the expiration of his sentence. See *Pennsylvania* v. *Mimms*, 434 U.S. 106, 108 n.3 (1977); *Sibron* v. *New York*, 392 U.S. 40, 51 (1968). The rule established by *Sibron*, which was reiterated in *Lane* (455 U.S. at 632), is that "a criminal case is moot only if it is shown that there is no possibility that any collateral consequences will be imposed on the basis of the challenged conviction" (392 U.S. at 57). Respondent plainly cannot make this demonstration.

First, a prior conviction such as respondent's will generally affect sentencing in any future federal criminal prosecution of respondent. See also 18 U.S.C. 3575 (sentence enhancement for dangerous special offenders). This is a sufficiently significant collateral consequence of the conviction to make appellate review possible. *Pennsylvania* v. *Mimms*, 434 U.S. at 108 n.3.[2] Especially given respondent's recurring violations of United States immigration laws (see Pet. 2-3), this is not a speculative concern. See *Pennsylvania*

---

[2]No contrary rule should be extracted from *Lane*, 455 U.S. at 632-633 & n.13. That case arose on collateral review — a matter of some importance to the result (see page 3, *supra*). Moreover, *Lane* is carefully and narrowly addressed to the effect of completion of a parole term upon a challenge limited to the lawfulness of the parole term. The Court's opinion makes clear that a challenge to a judgment of conviction would not be rendered moot in the circumstances of that case. 455 U.S. at 630-631 & n.10; see also *id.* at 632-633.

v. *Mimms*, 434 U.S. at 108-109 n.3.[3] Second, under 18 U.S.C. App. 1202(a)(1), the felony illegal entry conviction disables him from lawful possession of firearms, and renders him liable to substantial fines and imprisonment in the event of a violation even if he should in the future be lawfully admitted to the United States. See *Fiswick* v. *United States*, 329 U.S. 211, 222 (1946) (alien's felony conviction reviewable, inter alia, because conviction would undermine a future application for naturalization, and would, in the event of naturalization, cause a loss of civil rights).

Accordingly, the fact that respondent has served his sentence does not deprive him of a concrete interest in avoiding the conviction, and it does not deprive the government of a comparable interest in reinstating that conviction and having the benefit of the collateral consequences that the law

---

[3]In light of this track record, respondent's departure from this country does not affect the result. Cf. *United States* v. *Villamonte-Marquez*, No. 81-1350 (June 17, 1983), slip op. 2 n.2. Indeed, the United States Attorney has advised us that, subsequent to the court of appeals' decision in this case, on October 5, 1984, respondent was again apprehended and charged with illegal entry into the United States. Respondent was once again indicted for violations of 8 U.S.C. 1325 and 1326 on October 17, 1984, and on December 19, 1984 pleaded guilty to a felony violation of 8 U.S.C. 1325. Cr. No. 84-0919G (S.D. Cal.). The case is presently set for sentencing on February 11, 1985. We are advised that the presentence report, a copy of which has, in the ordinary course, been provided to respondent's counsel, indicates that respondent's 1983 conviction was reversed by the court of appeals, and that we have sought review of that decision in this Court. We are also advised that respondent's presentence report reflects that he has been apprehended for unlawful entry into the United States on numerous occasions.

visits upon a convicted felon.[4] As a practical matter, moreover, the representation of respondent by the Federal Defenders of San Diego assures that the Court will receive a full adversary presentation in support of the judgment of the court of appeals. The questions presented are, as respondent appears to acknowledge (Br. in Opp. 6), recurring ones in the lower federal courts. Their prompt resolution will have a salutary impact on the administration of justice.

For the foregoing reasons and those previously stated, it is respectfully submitted that the petition for a writ of certiorari should be granted.

REX E. LEE
Solicitor General

FEBRUARY 1985

---

[4]As the Court explained in *Mimms* (434 U.S. at 108 n.3):

> If the prospect of the State's visiting such collateral consequences on a criminal defendant who has served his sentence is a sufficient burden as to enable him to seek reversal of a decision affirming his conviction, the prospect of the State's inability to impose such a burden following a reversal of the conviction of a criminal defendant in its own courts must likewise be sufficient to enable the State to obtain review of its claims on the merits here.

Office-Supreme Court, U.S.
FILED
MAY 6 1985
ALEXANDER L. STEVAS,
CLERK

(3)

No. 84-1023

In the Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA, PETITIONER

v.

FERNANDO ROJAS-CONTRERAS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

ANDREW L. FREY
Deputy Solicitor General

JOSHUA I. SCHWARTZ
Assistant to the Solicitor General

PATTY MERKAMP STEMLER
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether the defense preparation period provision of the Speedy Trial Act, 18 U.S.C. 3161(c)(2), prohibits commencement of trial within 30 days of a defendant's arraignment on a superseding indictment when a defense preparation period of 30 days has already been allowed following arraignment on the original indictment.

2. Whether, in the circumstances of this case, any violation of Section 3161(c)(2) was harmless.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statute involved	2
Statement	2
Introduction and summary of argument	8
Argument:	
I. The Speedy Trial Act does not forbid commencement of trial sooner than 30 days following a defendant's arraignment on a superseding indictment	13
A. The language and structure of pertinent provisions of the Act confirm that return of a superseding indictment does not automatically trigger a new defense preparation period	13
B. The legislative history of Section 3161(c)(2) indicates that an automatic 30-day postponement of trial following a superseding indictment was not intended	21
C. Practical considerations also argue against extension of Section 3161(c)(2) to superseding indictments	30
II. In the circumstances of this case, any violation of Section 3161(c)(2) was harmless error	39
Conclusion	48

TABLE OF AUTHORITIES

Cases:

Albernaz v. *United States*, 450 U.S. 333	40
Avery v. *Alabama*, 308 U.S. 444	44

Cases—Continued: Page

Ball v. *United States*, No. 84-5004 (Mar. 26, 1985) .. 8
Callanan v. *United States*, 364 U.S. 587 40
Chambers v. *Maroney*, 399 U.S. 42 44
Perrin v. *United States*, 444 U.S. 37 13
Russello v. *United States*, No. 84-472 (Nov. 1, 1983) 13
United States v. *Allen*, 596 F.2d 227, cert. denied, 444 U.S. 871 47
United States v. *Anderton*, 752 F.2d 1005 41
United States v. *Arkus*, 675 F.2d 245 .....5, 6, 7, 9, 16, 17, 18, 32
United States v. *Aviles*, 623 F.2d 1192 21
United States v. *Bounos*, 730 F.2d 468 15
United States v. *Buble*, 440 F.2d 405, cert. denied, 404 U.S. 828 47
United States v. *Burton*, 584 F.2d 485, cert. denied, 430 U.S. 1069 21
United States v. *Cochran*, 697 F.2d 600 47
United States v. *Cronic*, No. 82-660 (May 14, 1984) 43, 44
United States v. *Daly*, 716 F.2d 1499 .....7, 36, 42, 44
United States v. *Darby*, 744 F.2d 1508, petition for cert. pending, No. 84-1261 13
United States v. *Dawson*, 516 F.2d 796, cert. denied, 423 U.S. 855 47
United States v. *Dennis*, 625 F.2d 782 16
United States v. *Guzman*, 754 F.2d 482, petition for cert. pending, No. 84-1604 .....9, 32, 37, 38
United States v. *Harris*, 724 F.2d 1452 .....7, 16, 17
United States v. *Hasting*, 461 U.S. 499 40
United States v. *Horton*, 676 F.2d 1165, cert. denied, 459 U.S. 1201 .....6, 9, 32
United States v. *MacDonald*, 456 U.S. 1 15
United States v. *Mastrangelo*, 733 F.2d 793 8
United States v. *Naftalin*, 441 U.S. 768 14
United States v. *Powell*, No. 83-1307 (Dec. 10, 1984) 36
United States v. *Richmond*, 735 F.2d 208 18
United States v. *Rodriguez-Restrepo*, 680 F.2d 920 15

Cases—Continued: Page

United States v. *Rush*, 738 F.2d 497, cert. denied, No. 84-685 (Feb. 25, 1985) 9, 16, 33
United States v. *Todisco*, 667 F.2d 255, cert. denied, 455 U.S. 906 ..... 9, 21
United States v. *Turkette*, 452 U.S. 576 13
United States v. *Ward*, 676 F.2d 94, cert. denied, 459 U.S. 835 47
United States v. *Williford*, No. 83-1376, cert. denied, No. 83-6814 (Oct. 9, 1984) 9, 33-34
United States v. *Wooten*, 688 F.2d 941 8
United States v. *Wright*, 573 F.2d 681, cert. denied, 436 U.S. 949 47

Constitution, statutes and rule:

U.S. Const. Amend. VI 22
Speedy Trial Act of 1974, Tit. I, 18 U.S.C. 3161 *et seq.* 8, 22
18 U.S.C. 3161 31
18 U.S.C. 3161(a) 1a
18 U.S.C. (1976 ed.) 3161(b) 23
18 U.S.C. 3161(b) 41, 1a
18 U.S.C. (1976 ed.) 3161(c) 22, 23
18 U.S.C. 3161(c) 42
18 U.S.C. 3161(c)(1) 8, 17, 18, 20, 23, 34, 40, 41, 1a
18 U.S.C. 3161(c)(2) .....*passim*
18 U.S.C. 3161(d)(1) 10, 14, 15, 2a
18 U.S.C. 3161(d)(2) 14, 2a
18 U.S.C. 3161(e) 14, 3a
18 U.S.C. 3161(g) 24
18 U.S.C. 3161(h) 17, 18, 3a
18 U.S.C. 3161(h)(1) 18
18 U.S.C. 3161(h)(1)-(7) 8
18 U.S.C. 3161(h)(1)-(9) 18
18 U.S.C. 3161(h)(6) 10, 14, 15, 3a
18 U.S.C. 3161(h)(7) 32
18 U.S.C. (1976 ed.) 3161(h)(8) 24
18 U.S.C. 3161(h)(8) 19, 20, 29, 4a
18 U.S.C. 3161(h)(8)(A) 4a
18 U.S.C. 3161(h)(8)(B) 4a
18 U.S.C. 3161(h)(8)(B)(i) 4a
18 U.S.C. 3161(h)(8)(B)(ii) 4a

Constitution, statutes and rule—Continued: Page

18 U.S.C. 3161(h)(8)(B)(iii) 5a
18 U.S.C. 3161(h)(8)(B)(iv) 10, 19, 20, 21, 34
18 U.S.C. 3161(h)(8)(C) 5a
18 U.S.C. 3161(j) 41
18 U.S.C. 3162(a)(1) 40, 41, 5a
18 U.S.C. 3162(a)(2) 18, 36, 40, 41, 6a
18 U.S.C. 3162(b) 41
18 U.S.C. (1976 ed.) 3163(c) 24
18 U.S.C. 3164(c) 41
18 U.S.C. 3165(a)-(c) 16
8 U.S.C. 1325 ..... 2, 3
8 U.S.C. 1326 3
18 U.S.C. 5036 44
28 U.S.C. 2111 40
Fed. R. Crim. P. 52(a) 40

Miscellaneous:

Comm. on the Administration of the Criminal Law of the Judicial Conference of the United States, *Guidelines to the Administration of the Speedy Trial Act of 1974, as Amended*:
(rev. 1979, with amendments through Aug. 1981) 16
(rev. 1979, with amendments through Oct. 1984) 8-9, 16, 42
125 Cong. Rec. (1979):
pp. 15456-15457 30
pp. 15457-15467 24
p. 15467 30
H.R. Rep. 93-1508, 93d Cong., 2d Sess. (1974) 22, 23, 24
H.R. Rep. 96-390, 96th Cong., 1st Sess. (1979) 20, 27, 28, 29
Second Circuit Judicial Council Speedy Trial Act Coordinating Comm., *Guidelines Under the Speedy Trial Act* (Jan. 16, 1979), *reprinted in The Speedy Trial Act Amendments of 1979: Hearings on S. 961 and S. 1028 Before the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. (1979) 24

Miscellaneous—Continued: Page

Misner, *The 1979 Amendments to the Speedy Trial Act: Death of the Planning Process*, 32 Hastings L.J. 635 (1981) 9
Proposed Amendments to the Speedy Trial Act of 1974: Hearings Before the Subcomm. on Crime of the House Comm. on the Judiciary, 96th Cong., 1st Sess. (1979) 24, 29, 30
S. 961, 96th Cong., 1st Sess. (1979) 27
S. 1028, 96th Cong., 1st Sess. (1979) 27
S. Rep. 93-1021, 93d Cong., 2d Sess. (1974) 22
S. Rep. 96-212, 96th Cong., 1st Sess. (1979) ..9, 20, 27, 28, 30, 31
Speedy Trial: Hearings on S. 754 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 93d Cong., 1st Sess. (1973) 23
Speedy Trial Act of 1974: Hearings on S. 754, H.R. 7873, H.R. 207, H.R. 658, H.R. 687, H.R. 773 and H.R. 4807 Before the Subcomm. on Crime of the House Comm. on the Judiciary, 93d Cong., 2d Sess. (1974) 23
The Speedy Trial Act Amendments of 1979: Hearings on S. 961 and S. 1028 Before the Senate Comm. on the Judiciary, 96th Cong., 1st Sess. (1979) 24, 25, 26, 27, 29, 30, 42
Webster's Third New International Dictionary (1976 ed.) 13

In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-1023

UNITED STATES OF AMERICA, PETITIONER

v.

FERNANDO ROJAS-CONTRERAS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is unreported. The district court's oral ruling denying respondent's motion for a continuance (Pet. App. 3a-4a) likewise is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 2, 1984. A timely petition for rehearing was denied on September 26, 1984 (see Pet. App. 5a). On November 17, 1984, Justice Rehnquist extended the time within which to file a petition for a writ of certiorari to and including December 26, 1984. The petition for a writ

of certiorari was filed on December 26, 1984, and was granted on February 19, 1985. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTE INVOLVED

The Speedy Trial Act provides in pertinent part (18 U.S.C. 3161(c)(2)):

> Unless the defendant consents in writing to the contrary, the trial shall not commence less than thirty days from the date on which the defendant first appears through counsel or expressly waives counsel and elects to proceed pro se.

Additional provisions of the Act that are referenced in the text are reproduced in the appendix to this brief.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of California, respondent, a Mexican citizen, was convicted of illegal entry into the United States having been convicted previously of the same offense, in violation of 8 U.S.C. 1325. He was sentenced to a term of imprisonment of one year and one day. The court of appeals reversed respondent's conviction on Speedy Trial Act grounds.

1. The evidence at trial showed that respondent is a citizen of Mexico and not a United States citizen. On December 7, 1981, respondent was convicted of illegal entry into the United States and was sentenced to one year's imprisonment. After serving his sentence, he was returned to Mexico (Tr. 256-257).

Thereafter, at approximately 4:00 a.m. on February 13, 1983, respondent entered the United States on foot, five miles east of the Chula Vista official port of entry. He carried no immigration documents with him. Respondent walked north along a flat mesa, crossed the Otay River, and stopped to rest on the southwest bank of Otay Lake. At 9:30 a.m., Border Patrol Agent William Harris found respondent and another alien sitting along the bank. Five other aliens were hiding nearby under a sheet of plastic. Each member of the group had muddy shoes and grass and straw in his hair, indicating that the group had just hiked from the border. Agent Harris asked the group if they were from Mexico, to which they replied, "yes." Tr. 156-166, 181, 186-192, 262.

Agent William Burt then arrived at the scene and recognized respondent as someone he had arrested before. Respondent was taken to the Brown Field Station and, after waiving his *Miranda* rights, agreed to talk to Agent Burt. Respondent identified himself as "Santiago Montano Meneses." He admitted that he had entered the United States that morning five miles east of the official port of entry and that he carried no documents entitling him to enter the United States. He further admitted that he had a prior arrest record for illegal entry. Respondent signed a voluntary departure form acknowledging that "I am illegally in the United States." Tr. 189-193, 209-217.

That night, after again waiving his *Miranda* rights, respondent told Border Patrol Agent Ted Stark that his name was in fact Fernando Rojas-Contreras, and that he had previously been convicted of and had served time for illegal entry. He also acknowledged that he had been sent back to Mexico upon his release from prison and that he had reentered the United States through the hills south of Otay Lake early that morning. Tr. 259-265.

2. On February 18, 1983, a federal grand jury sitting in the Southern District of California returned a two-count indictment charging respondent with felony illegal entry, in violation of 8 U.S.C. 1325, and reentry by a deported alien, in violation of 8 U.S.C. 1326. The indictment stated that the judgment of conviction for the prior illegal entry, which formed the predicate for enhancement of the Section 1325 offense to a felony, was

"rendered on or about December 17, 1981" (E.R. 4).[1] Respondent was arraigned on the two-count indictment on February 18, 1983. Trial was thereafter scheduled for April 19, 1984.

The date of the predicate conviction (actually December 7, 1981) was misstated by ten days in the February 18 indictment as a result of a typographical error (Tr. 15). It is undisputed that, on March 21, 1983, the respondent was provided with discovery by the government that disclosed the correct date of the predicate conviction (Tr. 15, 24).[2] On April 15, 1983, the grand jury returned a superseding indictment correcting the typographical error in Count One by changing "17" to "7." The superseding indictment charged the same two offenses as the original indictment; indeed, its wording was in all respects save the date of the predicate conviction identical to the original indictment (see E.R. 6-7). Respondent was arraigned on the superseding indictment on April 18, 1983 (Tr. 5-6).

---

[1] "E.R." denotes the excerpt of record prepared by respondent's counsel and filed in the court of appeals. Count One of the February 18 indictment charged, in its entirety (E.R. 3-4):

> On or about February 13, 1983, within the Southern District of California, defendant FERNANDO ROJAS-CONTRERAS, who was then and there an alien, did knowingly and unlawfully enter the United States from Mexico at a point near San Ysidro, San Diego County, California, which said time and place were then and there other than as designated by immigration officials of the United States for the entrance of immigrants into the United States; that before the commission of the offense hereinbefore set forth, said defendant was, in the United States District Court for the Southern District of California, convicted of the crime of illegal entry, and the judgment was pronounced and rendered on or about December 17, 1981: in violation of Title 8, United States Code, Section 1325.

[2] It also appears that respondent was represented in the earlier prosecution by counsel associated with the Federal Defenders of San Diego, Inc., which also supplied his counsel in connection with the present prosecution (Tr. 21-22).

3. At a pretrial conference later on April 18, 1983, defense counsel made an oral motion for a 30-day continuance of the trial, which was scheduled to commence the next day. He argued that, under Section 3161(c)(2) of the Speedy Trial Act, as interpreted by the Ninth Circuit in *United States* v. *Arkus*, 675 F.2d 245 (1982), respondent had an absolute right to a new 30-day trial preparation period following the return of the superseding indictment, even though the statutory trial preparation period had already been allowed following the original indictment.[3] Defense counsel asserted (Tr. 6) that *Arkus*

> holds once there is a rearraignment I have an automatic, if I so claim it, 30-day period. In fact, it's only to be excused if there's an express waiver of counsel. And so therefore under the statute and *Arkus*, I would make that demand.

In invoking Section 3161(c)(2), defense counsel simply relied on *Arkus*, which he described as "rather clear cut" (Tr. 9). He did not claim that respondent was in any respect prejudiced by the alteration in the date of the predicate offense accomplished by the superseding indictment, and he did not deny that he had been advised of the typographical error in the original indictment well in advance of the scheduled trial date. Respondent's counsel did argue that he needed additional time to consult a fingerprint expert and to review respondent's immigration ("A") file, but he did not claim that the need for additional time to complete these tasks had anything to do with the change in the indictment. Review of the immigration file, counsel urged, was necessary to defend the illegal reentry violation charged in Count

---

[3] The record suggests (Tr. 15) that the prosecutor initially called the attention of defense counsel to the court of appeals' decision in *Arkus*, believing that it was distinguishable, but that it was appropriate to allow the defense an opportunity to call it to the district court's attention.

Two; the fingerprint expert was needed, respondent argued, to determine whether respondent was the same person convicted of illegal entry on December 7, 1981. Tr. 10-12.

Citing the Seventh Circuit's decision in *United States* v. *Horton*, 676 F.2d 1165 (1982), cert. denied, 459 U.S. 1201 (1983), and seeking to distinguish *Arkus* on factual grounds, the government disputed that the Speedy Trial Act required a new 30-day defense-preparation period following the return of a superseding indictment in the circumstances of this case (Tr. 15-16, 17, 18-19). With respect to the separate practical justifications given by respondent for a discretionary continuance, the government pointed out that its own fingerprint expert had not yet compared respondent's prints to the prints of the person convicted on December 7, 1981, but that he planned to do so the following morning. The court ordered the government to have its expert contact defense counsel with the results of the analysis as soon as he had completed the task (Tr. 26-27). Ultimately, however, respondent agreed to stipulate that he was indeed the person convicted of illegal entry on December 7, 1981, rendering unnecessary expert testimony as to respondent's identity (Tr. 61, 256-257). In order to moot respondent's plea that he could not defend the charge in Count Two until he had reviewed the immigration file, the government offered to dismiss Count Two and to proceed to trial the next day on Count One alone. The court conditioned its denial of respondent's continuance motion upon dismissal of Count Two (Tr. 18, 23, 25-26).

In denying respondent's motion for a 30-day continuance, the district court relied substantially on the Seventh Circuit's decision in *Horton* and distinguished *Arkus* on factual grounds (Tr. 23-25). The court also emphasized that respondent was not in any respect prejudiced by being required to go to trial on the superseding indictment (Tr. 24-25):

> [T]he first issue before the court is whether or not there is any prejudice that has been shown by virtue of him going to trial on the superseding indictment on which he was just arraigned this morning. In other words, is the change of date in Count 1 so significant and causes a significant problem. I see none.
>
> To the extent that it appears that the discovery was very clear, the date that was being discussed is the date of the indictment, and therefore certainly the basis for their felony, and the prior act was clear from the discovery and clear from the inception. So it was a ministerial act to correct a date error where a "1" had been inserted in error, and that has been corrected by the superseding indictment. So I find that there has been no change—I mean, no prejudice from the superseding indictment.

4. The court of appeals reversed, holding that under its decision in *United States* v. *Harris*, 724 F.2d 1452 (1984), which in turn relied on *Arkus*, respondent was entitled to a new 30-day defense preparation period following his arraignment on the superseding indictment (Pet. App. 2a). The court of appeals rejected the government's argument that, because the superseding indictment merely corrected a typographical error of which defense counsel was already aware, no new defense preparation period was required. The court commented only on the government's observation that the original indictment could have been amended without resubmitting the case to the grand jury, describing this circumstance as "immaterial" and stating (Pet. App. 2a): "It was the government who chose to proceed by way of reindictment." Finally, citing its decision in *United States* v. *Daly*, 716 F.2d 1499, 1506 (1983), the court of appeals held that reversal of respondent's conviction was required to remedy the Speedy Trial Act violation (Pet. App. 2a):

> [A]ny pretrial preparation period shorter than thirty days is inadequate *per se*. No showing of prejudice is required.[4]

INTRODUCTION AND SUMMARY OF ARGUMENT

The Speedy Trial Act of 1974, as amended in 1979, 18 U.S.C. 3161 *et seq.*, establishes inside and outside time limits for commencing trial in criminal cases. Essentially, it constructs a window of time during which a case must be tried. On the one hand, pursuant to Section 3161(c)(2), the provision at issue here, added to the Act by the 1979 Amendments, trial may not commence earlier than 30 days "from the date on which the defendant first appears through counsel or expressly waives counsel and elects to proceed pro se" unless the defendant consents in writing to an earlier trial date. On the other hand, trial must begin no later than 70 days after "the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs." 18 U.S.C. 3161(c)(1). Certain proceedings, however, like the filing of a pretrial motion, automatically extend the 70-day limit by stopping the clock and creating periods of excludable delay. 18 U.S.C. 3161(h)(1)-(7).[5] The maximum time limit can also be extended in

---

[4] Following the decision of the court of appeals, respondent completed the term of imprisonment to which he was sentenced and was returned to Mexico (see Br. in Opp. 6). As explained in our Reply Memorandum at the petition stage (at 2-5), these developments do not moot this case, for respondent's conviction, if reinstated, will have significant collateral consequences. See also *Ball* v. *United States*, No. 84-5004 (Mar. 26, 1985), slip op. 9.

[5] It is generally held—and it is our view—that the 30-day minimum pretrial preparation period is not extended by such periods of excludable delay. See *United States* v. *Wooten*, 688 F.2d 941, 949-951 (4th Cir. 1982); *United States* v. *Mastrangelo*, 733 F.2d 793, 796-797 (11th Cir. 1984); see also Comm. on the Administration of the Criminal Law of the Judicial Conference of the United States, *Guidelines to the Administration of the Speedy Trial Act of 1974, as Amended* 14-15 (rev. 1979, with amendments through Oct. 1984); Misner, *The 1979 Amendments to the Speedy Trial Act: Death of the Planning Process*, 32 Hastings L.J. 635, 653 (1981); but see S. Rep. 96-212, 96th Cong., 1st Sess. 32 (1979); *United States* v. *Arkus*, 675 F.2d at 248 & n.4.

the discretion of the district court if the ends of justice so require. 18 U.S.C. 3161(h)(8). For instance, the 70-day period may be extended to ensure that the defendant has a "reasonable time to obtain counsel" and to ensure that his counsel has "reasonable time necessary for effective preparation." 18 U.S.C. 3161(h)(8)(B)(iv).

The question presented in this case concerns identification of the earliest permissible date for starting trial in a prosecution in which a superseding indictment has been returned. In our view, Section 3161(c)(2) does not guarantee a defendant a new 30-day preparation period following the return of a superseding indictment. The contrary holding of the court below has been rejected by every other court of appeals that has considered this issue.[6]

I

A. The court of appeals' decision is contrary to the language of Section 3161(c)(2), which provides a 30-day trial preparation period running from the "defendant['s] first appear[ance] through counsel." A defendant's arraignment on a superseding indictment charging the same offense plainly is not the defendant's first appearance, and it accordingly does not trigger a new 30-day period.

---

[6] See *United States* v. *Guzman*, 754 F.2d 482, 485-486 (2d Cir. 1985), petition for cert. pending, No. 84-1604; *United States* v. *Rush*, 738 F.2d 497, 510-511 (1st Cir. 1984), cert. denied, No. 84-685 (Feb. 25, 1985); *United States* v. *Williford*, No. 83-1376 (5th Cir. Feb. 27, 1984), slip op. 3-6, cert. denied, No. 83-6814 (Oct. 9, 1984); *United States* v. *Horton*, 676 F.2d 1165, 1169 (7th Cir. 1982), cert. denied, 459 U.S. 1201 (1983); *United States* v. *Todisco*, 667 F.2d 255, 260 (2d Cir. 1981), cert. denied, 455 U.S. 906 (1982).

This reading of the Act is corroborated by other provisions of the elaborate, highly articulated, statutory scheme. Reading Section 3161(c)(2) together with Section 3161(d)(1) and Section 3161(h)(6), it is apparent that Congress deliberately made no provision for the 30-day defense preparation period to start anew following a superseding indictment. In circumstances where Congress did so intend it made explicit provisions therefor in the Act.

The court of appeals' view of the operation of the 30-day rule also brings it into direct conflict with the 70-day rule that governs the outside time limit for trial. The court of appeals' analysis can lead to situations in which there is no trial date that is permissible as of right. Indeed, this case is such a case. Plainly Congress could not have intended such a result.

The court of appeals erroneously assumed that, absent coverage under Section 3161(c)(2), there would be no means for defendants to secure adequate preparation time following a superseding indictment. But wholly apart from the statutory 30-day rule, the district court has ample authority to continue a trial date where the defendant demonstrates actual need for further preparation time resulting from a superseding indictment. And Section 3161(h)(8)(B)(iv) of the Act, wholly overlooked by the court of appeals, ensures that such continuances are not constrained by the Act's 70-day outer time limit for commencing trial.

B. The legislative history of the Act demonstrates that Congress did not intend that the 30-day rule be applied to superseding indictments generally. To begin with, the court of appeal's construction clashes with the overriding purpose of the Act: to expedite criminal trials. While considerations of fairness might sometimes require additional defense preparation time as a result of material changes in a superseding indictment, Congress understood that the district courts would employ their scheduling discretion and grant whatever continuances were necessary to avoid "assembly line justice."

The 30-day defense preparation period provision of the Act, added by a 1979 amendment, was inspired by a set of guidelines developed by the Second Circuit for implementation of the Act. While those guidelines recommended that defendants be allowed at least 30 days' preparation time following arraignment, they made clear that this policy was not directly applicable to trials on superseding indictments. Congress adopted the 30-day rule from the Second Circuit guidelines in 1979 because it feared that some courts had overreacted to the prompt trial mandate of the Act. But there is no indication that Congress believed that the other devices available to assure adequate defense preparation time—the district court's authority to manage its calendar and defense requests for continuances—were inadequate to address any need that might arise for additional time above and beyond the initial 30-day period allowed at the outset of every prosecution. The 1979 legislative history makes unusually clear that Congress intended the Act to be interpreted in conformity with the Second Circuit guidelines.

C. Practical considerations also make clear that return of a superseding indictment should not be held to trigger a new, automatic 30-day preparation period. Superseding indictments are regularly and appropriately employed by federal prosecutors for such purposes as correcting minor or obvious errors in the original indictment, conforming the indictment to the evidence expected to be adduced at trial, and dropping defendants or counts. Such superseding indictments have no material bearing upon the ability of a defendant who has already had 30 days' preparation time to be ready for trial. This case perfectly illustrates our point. It is inconceivable that the correction of an obvious typographical error in respondent's indictment in any way altered his trial preparation burden. And even in cases where some additional preparation time may be warranted, the district court may allow an appropriate continuance—often, only

a brief delay would be necessary—without incurring the pointless delay that an automatic 30-day postponement frequently will entail. The requirement created by the court of appeals of an additional automatic 30-day delay in the trial is not only unnecessary to protect defendants' interests, but can cause severe disruption of the crowded dockets of the district courts, with attendant inconvenience to all participants. The court of appeals' ruling accordingly is strikingly inconsistent with the fundamental purpose of the Speedy Trial Act.

II

Even if the Speedy Trial Act were interpreted to require a new 30-day trial preparation period following a superseding indictment, any statutory violation here was most assuredly harmless error. Nothing in the statutory language or legislative history renders the general harmless error rule inapplicable to violations of the 30-day rule. Indeed, the statute does not prescribe any sanction at all for violations of Section 3161(c)(2). We may assume that a new trial is ordinarily an appropriate remedy, and that the defendant need not go forward with a showing of prejudice to invoke that remedy. But here the prosecution can overcome any presumption of prejudice. The change in the indictment was trivial, and was not, in any event, a surprise to respondent. Respondent has never suggested—and could not credibly suggest—that the superseding indictment affected his readiness for trial.

ARGUMENT

I. THE SPEEDY TRIAL ACT DOES NOT FORBID COMMENCEMENT OF TRIAL SOONER THAN 30 DAYS FOLLOWING A DEFENDANT'S ARRAIGNMENT ON A SUPERSEDING INDICTMENT

A. The Language And Structure Of Pertinent Provisions Of The Act Confirm That Return Of A Superseding Indictment Does Not Automatically Trigger A New Defense Preparation Period

1. In construing Section 3161(c)(2), "we look first to its language. If the statutory language is unambiguous, in the absence of 'a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive.' *United States* v. *Turkette*, 452 U.S. 576, 580 (1981)." *Russello* v. *United States*, No. 82-472 (Nov. 1, 1983), slip op. 4. Here, the statute speaks clearly. Section 3161(c)(2) prohibits the commencement of trial "less than thirty days from the date on which the defendant *first appears through counsel*" (emphasis added). "First" should be given its "ordinary * * * common meaning." *Perrin* v. *United States*, 444 U.S. 37, 42 (1979). As the dictionary confirms, there can only be one such "first" appearance in a case.[7] And as the Eleventh Circuit observed in *United States* v. *Darby*, 744 F.2d 1508, 1520 (1984), petition for cert. pending, No. 84-1261 (emphasis in original), "[w]hen employing the term 'first,' Congress presumably did not have *subsequent* appearances in mind." Once the defendant has appeared with counsel in a given prosecution, the event that triggers operation of Section 3161(c)(2) can never happen again.

Respondent and the court of appeals, however, propose that the defense preparation period runs not from the

---

[7] "First" is defined as "before any or some other person or thing (as in time, space, rank, or importance)." *Webster's Third New International Dictionary* 856 (1976 ed.).

date of the defendant's first appearance with counsel, but rather from his second, third, or perhaps 100th appearance with counsel. They would measure the 30-day period from the defendant's first "post-superseding indictment" appearance with counsel. But the statute simply contains no such qualification.

Indeed, Section 3161(c)(2) does not use the date of indictment as a reference point at all. "Nothing on the face of the statute supports" (*United States* v. *Naftalin*, 441 U.S. 768, 772 (1979)) respondent's argument that the return of a superseding indictment triggers a new preparation period. On the contrary, instead of referring to the date of indictment, Section 3161(c)(2) links the 30-day moratorium during which trial may not begin to the date of the defendant's first "appearance" *with counsel*. It thus assures a defendant that his attorney will have at least 30 days in which to prepare for trial. Had Congress intended that the return of a superseding indictment trigger a second moratorium on commencement of trial, it surely would have worded the statute so to provide.

2. a. Other provisions of the Speedy Trial Act confirm that Congress did not intend the 30-day preparation period to apply to superseding indictments. Although Congress provided for restarting speedy trial time limits in certain situations, see, *e.g.*, 18 U.S.C. 3161(d)(1), (d)(2) and (e), nowhere in the highly articulated statutory framework is provision made for a new trial preparation period following a superseding indictment. Indeed, close examination of Section 3161(d)(1) and Section 3161(h)(6) makes clear that this omission is deliberate.

Section 3161(d)(1) provides that when an indictment is dismissed on the defendant's motion and a new indictment is filed charging the defendant with the same or a related offense, the government is allowed a new period of 70 nonexcludable days to bring the defendant to trial and the defense is afforded a new 30-day trial preparation period. By contrast, neither Section 3161(d)(1) nor any other provision of the Act makes any provision for restarting of the Speedy Trial Act time limits when it is the *government* that dismisses the original indictment, or when a superseding indictment supplants the original indictment. It is clear, moreover, that this omission does not result from a legislative oversight. Section 3161(d)(1) retriggers the 30- and 70-day time limits upon refiling of charges following dismissal of a *complaint*, regardless of which party is responsible for the dismissal, whereas new time limits are triggered by renewed filing of charges after dismissal of an *indictment* only when the dismissal is "upon motion of the defendant" (18 U.S.C. 3161(d)(1)).

Section 3161(h)(6) of the Speedy Trial Act likewise confirms that this distinction is a deliberate one. That section provides that when an indictment is dismissed upon the government's motion, the period between that dismissal and the defendant's arraignment upon a subsequent indictment charging the same offense is not to be counted against the 70-day period within which trial must be held.[8] In requiring exclusion of the time when a defendant is not held to answer on any indictment, Congress plainly understood that, outside of the reindictment situations covered by Section 3161(d)(1), the time within which a defendant must be brought to trial on a subsequent indictment is measured from his arraignment on the *original* indictment, subject to the tolling rule of Section 3161(h)(6). Thus, when dismissal is on the government's own motion and there is no gap between dismissal and reindictment (so that Section 3161(h)(6) is not directly and literally controlling), the 70-day outside limit for commencing trial is to be computed

[8] See *United States* v. *Bounos*, 730 F.2d 468, 470 (7th Cir. 1984); *United States* v. *Rodriguez-Restrepo*, 680 F.2d 920, 921 (2d Cir. 1982); cf. *United States* v. *MacDonald*, 456 U.S. 1, 7 n.7 (1982).

directly by reference to the date of the original arraignment.[9]

When the 70-day time limit does not begin anew, the defendant should not be accorded a new 30-day preparation period. *United States* v. *Rush*, 738 F.2d 497, 511 (1st Cir. 1984). The Committee on the Administration of the Criminal Law of the Judicial Conference of the United States has also recognized as much in its *Guidelines to the Administration of the Speedy Trial Act of 1974, As Amended* 14 (rev. 1979, with amendments through Aug. 1981) (emphasis added):

> In the opinion of the Committee, *the* [*defense-preparation*] *period does not begin to run anew when superseding indictments are filed in circumstances in which the seventy-day time limit is determined by reference to the original indictment or information.* See Section 3161(h)(6). Nor does a new thirty-day minimum period begin to run if prosecution is resumed on an original indictment or information following a mistrial, appeal, or withdrawal of a guilty plea. In all of these situations, the trial court should use its scheduling discretion to ensure that the defense has time to prepare in the circumstances of the particular case.[10]

---

[9] See *United States* v. *Rush*, 738 F.2d at 510-511; *United States* v. *Horton*, 676 F.2d at 1170; cf. *United States* v. *Dennis*, 625 F.2d 782, 793 (8th Cir. 1980).

[10] The 1984 revision of these guidelines adds the observation that the Ninth Circuit's interpretation of Section 3161(c)(2) is, in this respect, contrary to the Committee's view. Comm. on the Administration of the Criminal Law of the Judicial Conference of the United States, *Guidelines to the Administration of the Speedy Trial Act of 1974, As Amended* 15-16 (rev. 1979, with amendments through Oct. 1984) ("*Judicial Conference Guidelines* (1984)"), citing *United States* v. *Harris*, 724 F.2d 1452 (9th Cir. 1984).

Curiously, in its decision in *United States* v. *Arkus*, 675 F.2d 245 (1982), in which it first adopted the reading of Section 3161(c)(2) applied in this case, the Ninth Circuit observed that the district court's plan for prompt disposition of criminal cases, approved by the Circuit Judicial Council (under 18 U.S.C. 3165(a)-(c)), required that the 30-day defense preparation period be reckoned from the original indictment whenever the outside time limit for trial was to be so computed. 675 F.2d at 248. That district court plan tracks the approach of the Judicial Conference Guidelines. The *Arkus* panel summarily concluded, however, that the local plan conflicted with the requirements of the Act in this respect and was to be disregarded. *Ibid.*

It should be noted that in *Arkus* the *prosecutor* had urged that the defendant was entitled to a new 30-day preparation period following reindictment. 675 F.2d at 247-248. The defendant had moved to dismiss the indictment on the ground that his trial was commenced beyond the 70-day outside time limit; the government responded that the 70-day period had been extended by the need to allow the defendant a new 30-day preparation period following reindictment. *Ibid.* Even when the government's mistake in *Arkus* was acknowledged, however, the Ninth Circuit refused to reconsider its reading of Section 3161(c)(2), adhering to *Arkus* in *Harris* and in the decision below.

As we explain next, unless the Judicial Conference Guidelines are followed a paradox ensues: there may be no date on which a timely trial may be held where a superseding indictment is returned more than 40 days after filing of the original indictment.

b. The court of appeals' interpretation of Section 3161(c)(2) renders the Act potentially unworkable because it engenders a clash between the requirements of that section and the fundamental provision of the Act—the outside time limit for trial established by Section 3161(c)(1). If a superseding indictment is returned after the 40th speedy trial day has passed, allowing a new 30-day defense preparation period after rearraignment may cause the earliest permissible trial date to fall more than 70 speedy trial days after the original indictment.

This is so because Section 3161(c)(2) is not an excludable delay provision. Compare 18 U.S.C. 3161(h)(1)-(9); see page 18 note 11, *infra*. Thus, if a defendant's first post-superseding-indictment appearance with counsel is, for instance, on the 50th speedy trial day, and trial may not commence for 30 days thereafter, absent some unrelated excludable delay the outside time limit for

commencing trial will be exceeded. Under the applicable sanctions provisions of the Act such a violation of the 70-day limit would require dismissal of the indictment (with or without prejudice). See 18 U.S.C. 3162(a)(2). Plainly Congress could not have intended that the Speedy Trial Act be interpreted so as to confront prosecutors and the district courts with the choice of trying criminal cases impermissibly early or impermissibly late. The artificial construction of Section 3161(c)(2) that creates this dilemma accordingly should be rejected.[11]

---

[11] It is not impossible to construe the Act as did the court below and still avert this clash between Section 3161(c)(1) and Section 3161(c)(2). But to do so requires distorting the Act in other respects.

First, Section 3161(c)(2) could be treated as an excludable delay provision that tolls running of the 70-day time limit. Indeed, this view was adopted by the district court in *Arkus*. See 675 F.2d at 248. But the moratorium on commencement of trial created by Section 3161(c)(2) is not included in the catalog of events creating excludable time, 18 U.S.C. 3161(h)(1)-(9); nor is it fairly described as "[an]other proceeding[] concerning the defendant" within the meaning of the generic exclusion for such proceedings, 18 U.S.C. 3161(h)(1). Moreover, if the 30-day defense preparation period automatically creates excludable time following a superseding indictment it is not apparent why the same is not true following every initial indictment. Of course, the result of recognizing such an exclusion would be to convert the 70-day outside time limit for trial into a 100-day time limit in every case. Obviously if Congress intended that result it would have so indicated clearly. See *United States* v. *Richmond*, 735 F.2d 208, 214 (6th Cir. 1984).

In *Arkus* the Ninth Circuit rejected the view that the 30-day defense preparation period tolls running of the 70-day period, concluding instead that the two periods run concurrently following return of a superseding indictment. 675 F.2d at 248. It is apparently the Ninth Circuit's view that trial should commence in such a case the day that the second defense preparation period expires. *Ibid.* But there is no more basis in the statutory language for this construction of the Act than there is for the interpretation discussed just above. And this second alternative approach is wholly unworkable because it allows the parties and the district court

This case well illustrates the paradox we have identified. The original indictment here was filed on February 18, 1983; respondent was arraigned the same day. The superseding indictment was filed 56 days later. No pretrial motions were filed in this case, and other pretrial proceedings (filing of the indictment and the re-arraignment) that create time excludable from the 70-day outside time limit for trial account for only two days. Accordingly, only 16 days then remained in which to commence respondent's trial. Respondent was arraigned on the superseding indictment on April 18, 1983. If respondent had been given a new 30-day preparation period at that point, his trial could not have begun until May 18, 1983, 17 days after the 70-day time limit had expired. Yet the circumstances of this case would have provided no justification for extending the 70-day limit so as to accommodate the additional delay. Compare pages 20-21, *infra*. Respondent would accordingly have secured the right to dismissal of the indictment simply by invoking his supposed right to a new preparation period.

---

only one permissible trial date. It seems safe to say that Congress did not have any such unmanageable regime in mind.

A third alternative for reconciling the 30- and 70-day rules under the court of appeals' decision would be to require the government to seek an "ends of justice continuance" under Section 3161(h)(8) of the 70-day outside time limit in order to accommodate the new 30-day defense preparation period. This is in fact the course that we have recommended to federal prosecutors in the Ninth Circuit who must comply with the decision under review at the present time. But it is inconceivable that Congress expected the government to have to seek a special continuance simply to preserve any window at all within which a case may be tried following a superseding indictment. And this approach would result in wholly unwarranted delays in many cases in which the return of a superseding creates no justification for trial delay. See pages 31-33, *infra*. Instead, as we explain in the ensuing text (pages 19-20), Congress surely expected that the defendant—the person actually seeking a delay of trial—would request an appropriate continuance of trial under Section 3161(h)(8)(B)(iv) if one were needed.

3. An additional provision of the Speedy Trial Act overlooked by the court of appeals supports our reading of Section 3161(c)(2). The Speedy Trial Act contains not one but two provisions that tend to ensure that defendants have adequate time to prepare for trial. The first is, of course, Section 3161(c)(2), the operation of which is directly at issue here. Section 3161(c)(2) assures that every defendant is afforded at least 30 days in which to prepare his case with the assistance of counsel. But a distinct provision, Section 3161(h)(8), is designed to ensure adequate preparation time to defendants when special circumstances of the case require that further defense preparation time be allowed beyond the time when the prosecution would be obliged by Section 3161(c)(1) to proceed to trial.

In enacting Section 3161(c)(2) in 1979 (see pages 27-30, *infra*), Congress recognized that both defendants and the prosecution sometimes need more preparation time than Section 3161(c)(1) on its face allows. Thus Congress simultaneously amended Section 3161(h)(8), which authorizes discretionary "ends of justice continuances" that are excludable from the outside time limit for trial, in order to make clear that a continuance should be granted where failure to grant one

> would deny the defendant reasonable time to obtain counsel, would unreasonably deny the defendant * * * continuity of counsel, or would deny counsel for the defendant * * * the reasonable time necessary for effective preparation, taking into account the exercise of due diligence.

18 U.S.C. 3161(h)(8)(B)(iv).[12] Section 3161(h)(8)(B)(iv) gives the Act the necessary flexibility to accommodate the effect of a superseding indictment. It adequately protects a defendant who legitimately needs additional preparation time for any reason, including the return of a superseding indictment, and who makes a

[12] See S. Rep. 96-212, 96th Cong., 1st Sess. 26, 31, 35 (1979); H.R. Rep. 96-390, 96th Cong., 1st Sess. 12 (1979).

properly supported application for such a continuance to the district court. See *United States* v. *Aviles*, 623 F.2d 1192, 1196 (7th Cir. 1980).

Moreover, within the 70-day limit of the Speedy Trial Act, the court has inherent authority to grant a continuance upon a proper showing of need, following a superseding indictment. If the district court abuses its discretion in denying a continuance, appellate relief is available. See, *e.g.*, *United States* v. *Todisco*, 667 F.2d 255, 260 (2d Cir. 1981); *United States* v. *Burton*, 584 F.2d 485, 489 (D.C. Cir. 1978), cert. denied, 439 U.S. 1069 (1979). Thus, in the era of the Speedy Trial Act, just as before its enactment, the district court's sound exercise of its inherent discretion to govern its calendar protects any defendant who seeks a continuance to prepare for trial on a superseding indictment that alters the charges in a manner that creates a legitimate need for delay.[13] Accordingly, there is no reason to extend the application of Section 3161(c)(2) beyond the circumstances specified on the face of the statute.

B. The Legislative History Of Section 3161(c)(2) Indicates That An Automatic 30-Day Postponement Of Trial Following A Superseding Indictment Was Not Intended

The legislative history of the Speedy Trial Act is also inconsistent with the court of appeals' reading of Section 3161(c)(2). A dominant theme that is reflected in the 1974 Act's legislative history was Congress's desire to obtain prompt disposition of criminal charges and swift punishment of offenders—a policy that is directly contrary to the court of appeals' recognition of a second automatic preparation period following the return of a superseding indictment. And Congress assured that the speedy trial mandate of the Act would not undermine the rights of defendants by authorizing them to seek

[13] Of course, where the outside time limit for trial must be extended to allow a reasonable continuance to the defendant, Section 3161(h)(8)(B)(iv) authorizes the necessary exclusion of time.

appropriate continuances to extend trial deadlines where necessary. Moreover, when Congress added Section 3161 (c) (2) to the Speedy Trial Act in 1979, it endorsed the provisions of the Speedy Trial Act interpretive guidelines that had previously been adopted by the Second Circuit. These guidelines pioneered the 30-day trial preparation period but made clear that a defendant was not automatically entitled to a new 30-day preparation period following the return of a superseding indictment.

1. As originally enacted, Title I of the Speedy Trial Act of 1974, 18 U.S.C. 3161 *et seq.*, established only outside time limits within which a criminal case had to be tried. See 18 U.S.C. (1976 ed.) 3161(c). It set no limit on the degree of expedition permitted. Moreover, the legislative history of the 1974 Act reflects little concern on the part of Congress that its provisions might cause defendants to be tried before they are ready. See generally, S. Rep. 93-1021, 93d Cong., 2d Sess. (1974); H.R. Rep. 93-1508, 93d Cong., 2d Sess. (1974). Instead, the legislative history conveys Congress's paramount concern that substantial pretrial delays are prejudicial to society's interests.

Prior to 1974, only the speedy trial guarantee of the Sixth Amendment restrained trial delay. In the view of Congress, however, the Sixth Amendment was inadequate to protect the public's right to speedy justice. S. Rep. 93-1021, *supra*, at 14-15. Congress was particularly concerned about the prevailing level of pretrial delay in federal criminal cases because it was aware of a 1970 National Bureau of Standards study indicating that the likelihood that a defendant who is released pending trial will commit additional crimes while on bail "increases significantly if he is not brought to trial within 60 days of arrest." *Id.* at 8; H.R. Rep. 93-1508, *supra*, at 14. In order "to assist in reducing crime and the danger of recidivism by requiring speedy trials" (*id.* at 8) and alleviate the administrative and financial burden of drawn out proceedings and lengthy pretrial detention of the accused (*id.* at 15), Congress in 1974 required

indictment within 30 days of arrest, arraignment within 10 days of indictment, and trial within 60 days of arraignment. 18 U.S.C. (1976 ed.) 3161(b) and (c).[14]

The 60-day arraignment-to-trial limit was supported by the American Civil Liberites Union and some members of the defense bar. See *Speedy Trial Act of 1974: Hearings on S. 754, H.R. 7873, H.R. 207, H.R. 658, H.R. 687, H.R. 773 and H.R. 4807 Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 93d Cong., 2d Sess. 226 (1974) [*"1974 House Hearings"*] (statement of Charles Morgan); *id.* at 338 (statement of Ivan E. Barris).[15] Some others argued that the proposed bill provided insufficient preparation time for defense attorneys. See, *e.g., Speedy Trial: Hearings on S. 754 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess. 145, 150 (1973) (statement and testimony of Gilbert S. Rosenthal). But there was evidently little support in Congress for the latter position. The House observed that the Act provided the district courts with ample authority to protect defendants' interests, emphasizing that "the defendant may request the court to continue his case for reasons which are within the interest of justice." H.R. Rep. 93-1508, *supra*, at 15.

Thus, as enacted in 1974, Section 3161(c) contained only an outside time limit for commencing trial; it did not mandate any fixed minimum interval before trial. At the same time, however, Congress emphasized that it

---

[14] In 1979 Congress folded the second and third intervals into the present Section 3161(c)(1), which sets a single 70-day deadline for commencing trial, running from indictment or arraignment, whichever occurs last (see page 8, *supra*).

[15] Barris testified (*1974 House Hearings* 338): "As I read Senate bill 754, I think there are certainly adequate protections to the rights of the defendant, there are provisions by which discretion can be exercised by the trial judge in seeing that the rights of the individual to a complete and full hearing are not trampled under in the headlong rush for the disposition of a trial."

had no intention to sanction "assembly-line justice" (H.R. Rep. 93-1508, *supra*, at 15). Congress ensured against the latter result by authorizing the district court to suspend the running of the outside time limit for trial by granting an "ends of justice continuance." Such a continuance was made available in various circumstances, when "the ends of justice served by granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial." 18 U.S.C. (1976 ed.) 3161(h)(8).

2. The evolution of the 30-day defense preparation period began with a set of guidelines issued by the Second Circuit Judicial Council interpreting the 1974 Act. Judicial Council Speedy Trial Act Coordinating Comm., *Guidelines Under the Speedy Trial Act* (Jan. 16, 1979), *reprinted in The Speedy Trial Act Amendments of 1979: Hearings on S. 961 and S. 1028 Before the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. 386-436 (1979) [*"1979 Senate Hearings"*].[16] Issuance of these guidelines was presumably prompted at least in part by the approaching effective date of the sanctions provisions of the 1974 Act.[17] The guidelines provided detailed guidance to the district courts in the Second Circuit as to the application of each provision of the Act. In addition, a preamble to the Second Circuit guidelines contained the suggestion that district courts generally allow a preparation period of at least 30 days before proceeding to trial when requested to do so by a defendant or the government (*Guidelines*, *reprinted at 1979 Senate Hearings* 392-393):

> To insure the accomplishment of the goal of accommodating the interests of speedy disposition of the charges with reasonable requests by counsel for adjournments, whenever the time between arraignment and the scheduled trial date does not exceed thirty (30) days, the Court shall (a) view a request for an adjournment of trial to a date beyond thirty (30) days but within the sixty (60) day limit liberally and (b) where such a request is denied, set forth its reasons for finding that the denial of the adjournment does not interfere with the defendant or Government's choice of counsel, or the parties' ability to prepare for trial without undue pressure.

Significantly, the Second Circuit guidelines also made clear that this recommendation was not intended to be applied, willy-nilly, to trials upon a superseding indictment. The guidelines discuss in considerable detail the application of the 1974 Act's 60-day arraignment-to-indictment deadline to various situations in which an additional or superseding indictment is filed. *1979 Senate Hearings* 415-420. The guidelines explain that in the situation where a superseding indictment adds new charges, trial of the original charges must begin "within the time limit for commencement of trial on the original indictment or information," whereas a new 60-day period is available in which to try newly charged offenses. *Id.* at 416-417, 418-419. Moreover, the Second Circuit guidelines offered a hypothetical illustration of this principle in which a superseding indictment containing both new and previously charged offenses is handed up on the 55th day of the 60-day arraignment-to-indictment period established by the 1974 Act. *Id.* at 418. The guidelines explain (*id.* at 418-419; emphasis added)

> [I]n this hypothetical, following the arraignment on the superseding indictment, there are only five (5) days of non-excluded "arraignment-trial" interval time left for trial of those offenses in the superseded-

[16] The Second Circuit guidelines are also reprinted in *Proposed Amendments to the Speedy Trial Act of 1974: Hearings Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 96th Cong., 1st Sess. 306-353 (1979), and at 125 Cong. Rec. 15457-15467 (1979).

[17] The 60-day arraignment-to-trial time limit adopted in the 1974 Act was phased in gradually over a four-year period ending July 1, 1979, rather than being made effective immediately. 18 U.S.C. 3161(g). Moreover, the mandatory dismissal sanction for a violation of the applicable time limits was not to take effect until July 1, 1979. 18 U.S.C. (1976 ed.) 3163(c).

> ing indictment that are contained in the original indictment. *If the Government wishes to try all counts of the superseding indictment together*, which is presumably the case, *it will have to be prepared to try the entire indictment five (5) days after arraignment* [unless an] (h)(8) continuance [of the deadline for trying the original charges] is granted.

The Second Circuit guidelines thus indicate that the government is free to proceed to trial immediately following return of a superseding indictment—upon all charges—if it wishes to do so. The 30-day preparation period recommended by the Second Circuit guidelines was therefore not routinely applicable to trials upon a superseding indictment. Rather, requests of defendants seeking to postpone trial on a superseding indictment were to be carefully scrutinized on a case-by-case basis.[18] Because, as we explain below, Congress borrowed heavily from the Second Circuit guidelines in amending the Speedy Trial Act in 1979, and endorsed the Second Circuit's approach

[18] The guidelines observe that a superseding indictment may properly be employed to add charges that do not even arise out of the same transaction as those previously charged, offering the example of additional bank robberies committed by a single defendant. *1979 Senate Hearings* 420. The guidelines encourage the granting of an (h)(8) continuance in such situations, "where necessary" to permit a single trial on properly joined charges, evidently assuming that either the prosecution or the defendant is likely to need more preparation time on the new charges in such cases. *Ibid.* But the guidelines emphasize that this will not invariably be required (*ibid.*; emphasis added):

> It is noted that often, before the filing of a superseding indictment, the defendant is advised by the Government attorney that the Government will offer evidence of other charges at trial, and full discovery is conducted with respect to such other charges. *Where these other charges are incorporated in a superseding indictment, the Court may wish to adhere to the originally scheduled trial date,* after finding that under the circumstanes, neither party needs any additional time to prepare for trial on the superseding indictment. *Nothing in these comments precludes such action by the Court.*

to implementation of the Act, Section 3161(c)(2) should not be construed to require an automatic 30-day postponement of trial following return of a superseding indictment.

3. As we have mentioned, the minimum defense preparation period was introduced into the Speedy Trial Act by the 1979 Amendments, which added 18 U.S.C. 3161(c)(2). The defense preparation period provision received comparatively little attention in the legislative history, however. The primary focus of attention was proposals of the Justice Department and the Judicial Conference that would have substantially increased the maximum time limits that were included in the 1974 Act.[19] But the pertinent legislative history does confirm that the 30-day minimum preparation period was adopted from the Second Circuit guidelines, and it lends no support whatsoever to the court of appeals' reading of this provision in the instant case.

While Congress rejected the appeal made by the Justice Department and the Judicial Conference for a significant extension of the basic deadlines set in 1974, the arraignment-to-trial deadline was enlarged to 70 days (see page 23 note 19, *supra*), and a host of clarifying changes were made, particularly in the excludable time provisions of the Act. In addition to these actions, of course, Congress established the 30-day minimum preparation period.

a. There is relatively little in the legislative history of the 1979 Speedy Trial Act amendments that bears directly on the question whether a new defense preparation period must be allowed automatically following a superseding indictment. But the available legislative history makes clear that Section 3161(c)(2) was not designed to anticipate every development in the course of a prose-

[19] See S. 961, 96th Cong., 1st Sess. (1979) (Justice Dept. bill), *reprinted in 1979 Senate Hearings* 4-5; S. 1028, 96th Cong., 1st Sess. (1979) (Judicial Conference bill), *reprinted in 1979 Senate Hearings* 9-10. See also S. Rep. 96-212, 96th Cong., 1st Sess. 14-28 (1979); H.R. Rep. 96-390, 96th Cong., 1st Sess. 4-11 (1979).

cution that might make extra preparation time appropriate, or to obviate exercise of the district court's discretionary authority to grant appropriate continuances. The Senate Report states simply that "[t]his provision assures the defendant some *minimal* time to prepare." S. Rep. 96-212, 96th Cong., 1st Sess. 32 (1979) (emphasis added). Significantly, Congress saw the problem of the defendant's ability to prepare for trial primarily as a problem of unwarranted judicial unwillingness to grant ends-of-justice continuances of the *outside* time limit for trial. *Id.* at 26.[20]

As we have already observed (page 20), Congress's response was to rewrite Section 3161(h)(8) to make clear that the defendant's need for reasonable preparation time is a proper basis for granting such a continuance. See S. Rep. 96-212, *supra*, at 26, 31, 33; H.R. Rep. 96-390, 96th Cong., 1st Sess. 12 (1979). Plainly then, the legislative history provides no support for the wooden reading of Section 3161(c)(2) adopted by the court of appeals. It was Congress's intent simply to provide the defendant with a modest preparation period that would be sufficient for counsel to prepare in most cases; special circumstances requiring further preparation time that arise in a much smaller class of cases were to be addressed through applications for continuance addressed to the district court's informed discretion.

b. The legislative history also demonstrates that Congress was familiar with and endorsed the Second Circuit guidelines, including the 30-day trial preparation period. During the legislative hearings there was some testimony

[20] The Senate Report states (at 26):

> If courts, feeling compelled to schedule trials immediately, are loathe [sic] to grant "ends of justice" continuances to permit adequate preparation time—and the Committee finds considerable evidence that many are—and construe automatically-excludable delays with too much inflexibility, the defendant and his counsel may shoulder an unintended and unwarranted share of the speedy trial burden.

that defendants were being brought to trial in less than 30 days, resulting in inadequate time to prepare (see *1979 Senate Hearings* 93 (testimony of John Cleary)), and there was considerable testimony that the 60-day arraignment-to-trial deadline denied defendants as well as the government needed preparation time. See, *e.g.*, *Proposed Amendments to the Speedy Trial Act of 1974: Hearings Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 96th Cong., 1st Sess. 75 (1979) ["*1979 House Hearings*"] (testimony of Judge Feikens); *1979 Senate Hearings* 115 (statement of Salvatore Martoche). While some members of Congress were skeptical that any reform was needed in this area, see, *e.g.*, *id.* at 15 (remarks of Rep. Conyers), the view that predominated was that the Second Circuit guidelines offered an appropriate model for correcting any problem in this area. Thus, in response to the plea of defense counsel spokesman Louis Haremski that "[w]hat we need is just a little more time to the defense to prepare for trial" (*1979 Senate Hearings* 121), Senator Biden, a principal sponsor of the bill ultimately enacted by the Senate, responded (*id.* at 122):

> [I]t seems to me that the second circuit application of the present rules, the second circuit guidelines which would allow the 30-day minimums, could accommodate that concern.

Both the Senate and House Hearings, moreover, identified Section 3161(c)(2) directly with the Second Circuit guidelines. *1979 Senate Hearings* 82 (testimony of Prof. Freed and remarks of Sen. Biden); *1979 House Hearings* 14-15 (testimony of Shirah Neiman). The House Report spotlights the latter testimony. H.R. Rep. 96-390, *supra*, at 6. The solution ultimately adopted by Congress, enactment of Section 3161(c)(2) coupled with amendment of Section 3161(h)(8), directly follows the Second Circuit's model.

Moreover, the Second Circuit guidelines as a whole were a primary object of attention during Congress's

consideration of the 1979 Amendments. They were reproduced in haec verba in the record of both the House and Senate hearings, as well as in the Congressional Record. See page 244, note 16, *supra*. And the hearings themselves are replete with descriptions of and laudatory references to these guidelines.[21] The Senate Report commended the Second Circuit guidelines to the courts generally as a source of instruction on the proper application of the Act (S. Rep. 96-212, *supra*, at 20):

> The Second Circuit has interpreted the Act and its legislative history in a creative manner which preserves its objectives and specifically addresses most of the problems which have hindered its smooth implementation * * *. After careful reading, the Committee is of the opinion that the Second Circuit guidelines are worthy of consideration by all the districts as a model for future implementation, consistent with presently-contemplated changes. The Committee invites every circuit council and district chief judge to give them the closest attention possible.

The Second Circuit guidelines were also a centerpiece of Senator Biden's remarks to the Senate urging adoption of the 1979 Amendments. 125 Cong. Rec. 15456-15457, 15467 (1979). In these circumstances, even if the statutory language and structure left any room for doubt, Congress should be understood to have followed the Second Circuit's model, which clearly did not require a further automatic pretrial delay following return of a superseding indictment.

C. Practical Considerations Also Argue Against Extension Of Section 3161(c)(2) To Superseding Indictments

The primary purpose of the Speedy Trial Act was to accelerate criminal trials. The defense preparation pro-

[21] *1979 Senate Hearings* 68, 72, 73, 131, 133, 134, 135, 138, 147; *1979 House Hearings* 10, 354.

vision was added to the Act as a grace note to ensure that defendants' rights to effective representation by counsel are not inadvertently undercut. There is inevitably some degree of tension between the fundamental goal of the Act—prompt disposition of criminal cases—and the countervailing policy of Section 3161(c)(2). This tension is minimized, however, if Section 3161(c)(2) is construed, in common-sense fashion, to allow one automatic preparation period at the outset of a prosecution, when some preparation time will always be needed, and to require defendants to request and to demonstrate the need for additional delay following the return of a superseding indictment.[22]

1. Following the return of an original indictment, the defendant necessarily has much to do. He must retain counsel. He must consider how to plead. He must evaluate possible lines of defense and locate and interview witnesses. Usually, his attorney must prepare and file pretrial motions. The defendant and his counsel must confer on trial strategy. Consequently, there is a legitimate need for 30 days' preparation time following the return of the original indictment in most cases. At the same time, because the period is measured from the defendant's first appearance with counsel, a date that generally occurs within days of indictment, this preparation time would rarely frustrate society's interest in swift justice.

In contrast to an original indictment, a superseding indictment will often require no further trial preparation on the part of the defendant. Superseding indictments

[22] In many instances, both the prosecution and the defense may prefer for reasons of convenience to have a trial delayed. But it is quite clear that Congress did not mean to permit the parties to delay trials, even by mutual agreement, except under certain specified circumstances. See S. Rep. 96-212, *supra*, at 28-29. The decision of the court of appeals enables the parties to circumvent this policy almost at will by the simple expedient of having a superseding indictment with trivial changes returned shortly before the scheduled trial date.

are obtained for a variety of reasons. They are regularly and appropriately obtained for purposes that have no material bearing upon the ability of a defendant to be ready for trial. For instance, they are often, as here, returned for the sole purpose of correcting a typographical error or other purely formal error in the original indictment. The correction of such an error will rarely create the need for additional preparation time, yet if Section 3161(c)(2) is read as respondent proposes, trial must await the expiration of a new, superfluous preparation period in such cases.[23]

In the same vein, superseding indictments are frequently returned to eliminate some of the charges. See, *e.g.*, *United States* v. *Horton*, *supra*. Such action reduces rather than increases the burden on the defense. Yet under the court of appeals' interpretation, the Act would nevertheless require a delay of the trial date in this situation. Superseding indictments are also used to drop or add defendants without altering in any manner the charges facing the original defendants. See, *e.g.*, *United States* v. *Guzman*, 754 F.2d 482, at 486 (2d Cir. 1985) (dropping defendants on possession count); *United States* v. *Rush*, 738 F.2d at 510 (adding a defendant). Again, these situations create no basis for *requiring* deferral of trial as to the original or remaining defendants.[24]

Superseding indictments may also be employed to alter or add charges. The latter may be additional charges arising out of a common criminal incident, or may even be factually unrelated repetitions of the same kind of

---

[23] A new indictment may also simply reinstitute charges that had been dropped because of the unavailability of a witness. See, *e.g.*, *United States* v. *Arkus*, *supra*. In such cases the need for additional defense preparation time turns on the circumstances of the case; there is no warrant for assuming that the need for preparation is the same as though the defendant had never been previously charged.

[24] Under Section 3161(h)(7), joinder of new defendants may permit deferral of the commencement of trial as to all defendants.

offense. But the Second Circuit guidelines indicate (see pages 24-26, *supra*) that such superseding indictments also do not necessarily require 30 days of additional defense preparation time. Frequently, a superseding indictment simply conforms the indictment more precisely or in greater detail to the contents of the bill of particulars, or otherwise reflects the filing or disposition of pretrial motions. Or a superseding indictment may simply add substantive counts that already were part of the original indictment in the form of overt acts charged under an overarching conspiracy count. In such situations the return of a superseding indictment ordinarily does not add to the defendant's task of preparation. Even when an indictment is superseded to charge a given criminal transaction in a different manner, the new indictment does not always require significant additional preparation; the defendant's defense may be equally applicable to the new indictment and his strategy may be totally unaltered by the change in the offenses charged. And, as the Second Circuit guidelines point out, even when completely new criminal transactions are charged, delay may be unnecessary because the prosecution has given the defendant sufficient informal notice prior to the return of the superseding indictment as to the evidence and theories to be adduced against him. See page 26 note 18, *supra*.

2. a. With the exception of the court below, the courts of appeals have uniformly rejected the view that the return of a superseding indictment automatically triggers a new pretrial preparation period. See page 9 note 6, *supra*. Several courts have, however, suggested in dictum that there may be circumstances in which a new statutory 30-day period would be warranted. For instance in *Rush*, 738 F.2d at 511, the First Circuit indicated that it might apply Section 3161(c)(2) to a superseding indictment if "in a specific case [to do otherwise] would deprive a defendant of adequate opportunity to prepare his defense." Similarly, in *United States* v. *Wil-*

liford, No. 83-1376 (5th Cir. Feb. 27, 1984) slip op. 4-5, the Fifth Circuit declined to "announce [or] imply a general rule that a defendant is never entitled to assert the protection of § 3161(c)(2) when the government secures a superseding indictment," explaining (*id.* at 5):

> Whether a defendant is entitled to a new 30-day period is a question properly within the province of the trial judge's discretion. The judge must give due consideration to the purpose and intent of the Speedy Trial Act and carefully examine the details of the case for any prejudice to the defendant.

To the extent that these cases may suggest that Section 3161(c)(2) *itself* requires a *30-day* continuance following arraignment on a superseding indictment that creates need for additional defense preparation time, we believe they are erroneous, potentially confusing, and unnecessary. Such situations are fully accommodated by the defendant's right to make known his need for additional time, invoking the court's traditional authority to grant a continuance (in conjunction, where necessary because the continuance would exceed the Act's 70-day outer limit, with Section 3161(h)(8)(B)(iv)). See pages 19-21, *supra*.

The language and structure of the Act, coupled with relevant policy considerations, strongly suggest that Congress could not have intended the rigid provisions of Section 3161(c)(2) to provide the vehicle for selectively affording further preparation time to defendants in those cases where it may be justified. Applying Section 3161(c)(2) in the case of *some* superseding indictments does not avoid most of the objections to application of Section 3161(c)(2) to *all* superseding indictments. See pages 13-19, *supra*. Especially significant in this connection is the need to interpret the 30-day preparation provision in a manner that does not foster violations of Section 3161(c)(1). After all, the outside time limit for trial is not automatically extended even when the superseding

indictment would warrant a continuance.[25] It is thus unlikely that Congress intended that a new 30-day period be triggered "automatically" in certain cases, based on a detailed assessment of the facts involved, when the result would be to force the court and the government into violation of their own Speedy Trial Act deadline, at least absent a timely request by a party for a *discretionary* ends-of-justice continuance. See pages 17-19 & note 11, *supra*.

Moreover, the ostensibly flexible reading of the 30-day rule suggested by the First and Fifth Circuits would create unnecessary disruption of district court calendars. Even when additional trial preparation is warranted following a superseding indictment, a full 30 days often will be unnecessary. Yet the "flexible" interpretation of Section 3161(c)(2) actually deprives the court of the ability to gauge the amount of additional trial time needed by the defendant as it is determining whether further time is needed at all. In addition, this interpretation will prove difficult for the lower courts to administer, since it leaves quite unclear when an "automatic" 30-day period is required and when it is not. One of the virtues of Section 3161(c)(2) as written—and, we might add, the only virtue of the Ninth Circuit's sharply contrasting construction—is that it is truly clear to the court and the parties when the right to an automatic preparation period exists.[26]

---

[25] For example, if a superseding indictment is returned on the 50th nonexcludable day, with trial set for the 55th day, the court is unconstrained by the Act in granting a continuance of up to 15 days if one is deemed appropriate. Any extension of the continuance beyond that, however, while possible under the Act, must be based upon a finding that it is required by the ends of justice.

[26] The difficulty that would be created by application of the rigid requirements of Section 3161(c)(2) to trials on superseding indictments is compounded, moreover, because the statute on its face sharply restricts recognition of any waiver of the right conferred: trial in less than 30 days' time is simply prohibited absent "the defendant['s] consent[] in writing." By contrast, if the defend-

Nor is there any reason why it would be unfair to require the defendant—who is in the best position to appraise the impact of a new indictment upon his trial preparation—to seek a continuance if he needs additional preparation time after a superseding indictment. That is the practice that prevailed prior to the enactment of the Speedy Trial Act. And the legislative history of the 30-day rule makes clear that the provision was intended simply to curb an excessive zeal for the promptest possible scheduling of trials that may have been created by the enactment of the original provisions of the Act, rather than any view that other safeguards against hasty trials were generally inadequate. See pages 20, 23-24, 27-28, *supra*. Accordingly, there is no need to press the 30-

---

ant's recourse for additional preparation time is to the court's power to grant a continuance in the interest of justice, defendant will be held to have waived any claim if a continuance is not timely sought and justified. While the exact import of the non-waiver language of the 30-day rule appears to be an open question, it seemingly creates some potential for disruption of proceedings by tardily raised claims. This is particularly troublesome because, as noted, the applicability of Section 3161(c)(2) to certain superseding indictments would necessarily be somewhat unclear under the reading entertained by some of the courts of appeals.

We would suggest that the waiver language of Section 3161(c)(2) should not be read to overcome the general rule that claims not raised in district court should not be entertained on appeal, at least not when the submission made on appeal is that, because of the nature of the superseding indictment, a second 30-day preparation period should have been allowed. See *United States* v. *Daly*, 716 F.2d 1499, 1506 & n.5 (9th Cir. 1983); cf. *United States* v. *Powell*, No. 83-1307 (Dec. 10, 1984), slip op. 4 n.6 (declining to consider, *inter alia*, a claim based on Section 3161(c)(2) not considered by the court of appeals). On the other hand, a comparison of Section 3161(c)(2) with the waiver provision applicable to violations of the 70-day outside time limit for trial, which must be objected to "prior to trial" (18 U.S.C. 3162(a)(2)), suggests that tardy invocation of Section 3161(c)(2) may be permissible at the district court level. Because of this possibility, a "bright line" rule as to the applicability of Section 3161(c)(2) is particularly desirable.

day rule into service to prevent unduly quick trials on superseding indictments. A rule that requires the defendant to seek a continuance and justify the amount of time requested is most compatible with efficient management of district court dockets and with the prompt disposition policies of the Act. Accordingly, even if the change effected by a superseding indictment is one that would support allowance of additional time for defense preparation, it does not follow that Section 3161(c)(2) is applicable.

b. A recent decision of the Second Circuit, *United States* v. *Guzman*, 754 F.2d 482 (1985), petition for cert. pending, No. 84-1604, illustrates the proper approach to this problem. There, the original indictment charged Guzman and two others with a conspiracy of two days' duration to possess and distribute cocaine, and with an associated possession offense. Following a mistrial declared on unrelated grounds, a superseding indictment was returned that expanded the duration of the alleged conspiracy to two years and dropped Guzman's co-defendants from the possession count.[27] Guzman sought a continuance of trial, but the court commenced trial on the superseding indictment one day after it had been returned. 754 F.2d at 484-486.

The court of appeals reversed Guzman's conviction on the conspiracy count but affirmed as to the possession count. It held that Section 3161(c)(2) does not "divest[] a district court of its discretion to grant or refuse a continuance" following a superseding indictment "where this discretion is exercised in keeping with the policies underlying specific provisions of the Act." 754 F.2d at 486. Specifically, the court held that "[w]hen a superseding indictment makes only insubstantial changes in an original indictment, so that a defendant has not

---

[27] The superseding indictment was sought to overcome a defense objection to admission in evidence of a ledger that recorded narcotics transactions occurring within the extended period of the conspiracy.

been deprived of adequate time to prepare a defense * * * a district court may exercise its discretion in proceeding to trial without further delay" (*ibid.*).

The court concluded that the change in the conspiracy count was significant because the defendant's counsel "specifically indicated to [the district court] that he needed more time to obtain proof that Guzman was not in the country until after the enlarged conspiracy period began"—a "new line of defense, which would not have been available to him under the original indictment" (754 F.2d at 386). The court held that the "district court abused its discretion in not granting defendant Guzman a reasonable continuance to prepare his defense to the charge of participation in a two-year conspiracy." *Ibid.*[28] On the other hand, Guzman's conviction on the possession count was affirmed because "the deletion of co-defendants * * * from the possession count in the second indictment changed neither the prosecution's case, nor conceivable defenses by Guzman" and the defendant "could not possibly have been prejudiced because required to proceed to trial on this charge." *Ibid.*

3. Under the reading of Section 3161(c)(2) adopted by the court of appeals in this case, a new 30-day preparation period is required regardless of the insignificance of the change effected by the superseding indictment. See page 7, *supra*. For the reasons that we have outlined above (pages 13-30), this reading is plainly false to Con-

[28] Although certain of the court of appeals' language in *Guzman* could be read as suggesting that this result was required by Section 3161(c)(2), it is apparent upon close reading that the court looked only to the policy of that section to guide the exercise of district court discretion on a continuance application. Significantly, the court did not require a 30-day delay, but spoke of a "reasonable continuance" and emphasized the particularized showing of need for additional time that defense counsel had made. The court also summarized its holding respecting the conspiracy count by stating that "Guzman should not have been compelled to stand trial on that count until *a reasonable time* after this indictment was filed" (754 F.2d at 484; emphasis added).

gress's intention. On the other hand, under any plausible alternative reading of the statute the judgment of the court of appeals must be reversed. Compare pages 33-38, *supra*.

Unlike the defendant in *Guzman*, respondent has never suggested any reason why the superseding indictment, which merely corrected a typographical error as to the date of his prior conviction, made more trial preparation time necessary. By any standard this change was truly insubstantial. In any event, because the prosecution had notified respondent long before trial of the correct date of his prior conviction, the change made in the superseding indictment provides no conceivable basis for a 30-day postponement of the scheduled trial.[29] If a change such as the one made here is held to require an inflexible 30-day moratorium of commencement of trial, the policies of the Speedy Trial Act will be flouted, rather than served.

II. IN THE CIRCUMSTANCES OF THIS CASE, ANY VIOLATION OF SECTION 3161(c)(2) WAS HARMLESS ERROR

Even if Section 3161(c)(2) could be read to require a new 30-day defense preparation period in the circumstances of this case, the judgment of the court of appeals could not stand. The court below held that a violation of Section 3161(c)(2) is "per se" reversible error requiring that the defendant be afforded a new trial (Pet. App. 2a). There is nothing in the statute mandating this in-

[29] As we explain in connection with our discussion of the harmless error issue (pages 45-47), it is significant that this error could have been corrected without resorting to a superseding indictment. The return of superseding indictment in such circumstances cannot possibly justify delay of the trial. The court of appeals' suggestion that the government is required to live with its election to reindict (Pet. App. 2a) is not responsive to our argument. Congress could not have intended to require a new 30-day preparation period in circumstances where reindictment may be dispensed with.

flexible remedy. And in the absence of such a statutory prescription the court of appeals should have applied the harmless error rule of Fed. R. Crim. P. 52(a). When a harmless error analysis is undertaken it becomes clear that a new trial for respondent is wholly unwarranted.

1. The harmless error doctrine is a fundamental feature of federal criminal law. Rule 52(a) of the Federal Rules of Criminal Procedure commands that "[*a*]*ny error* * * * which does not affect substantial rights shall be disregarded" (emphasis added). And 28 U.S.C. 2111 mandates that "[o]n the hearing of any appeal * * *, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties." In *United States* v. *Hastings*, 461 U.S. 499, 509 (1983), this Court reaffirmed "the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless, including most constitutional violations * * *."

"Congress is 'predominantly a lawyer's body'" (*Albernaz* v. *United States*, 450 U.S. 333, 341 (1981), quoting *Callanan* v. *United States*, 364 U.S. 587, 594 (1961)); it presumably was aware of Rule 52(a) when it amended the Speedy Trial Act in 1979. If Congress intended to preclude application of harmless error analysis it would have clearly signaled its intent in the Speedy Trial Act. In fact, nothing in the Act precludes application of a harmless error analysis to violations of Section 3161(c)(2).

The Speedy Trial Act is replete with remedial prescriptions, but none of these provides any sanction for violations of Section 3161(c)(2). For instance, Section 3162(a)(1) requires dismissal of pending charges if the arrest-to-indictment time limit established by Section 3161(b) is violated. Section 3162(a)(2) mandates dismissal of an indictment when a defendant is not brought to trial within the period established by Section 3161(c)(1). (Under either provision dismissal may be with or without prejudice, as the circumstances of the violation

and other statutory considerations dictate.) Section 3162(b) prescribes disciplinary sanctions for attorneys who knowingly delay trial without justification. And when a defendant is incarcerated for more than 90 non-excludable days before commencement of his trial, the statute prescribes "automatic review by the court of the conditions of release" as the proper remedy (18 U.S.C. 3164(c)). Congress plainly knew how to make its intentions regarding appropriate remedies clear. In light of Congress's failure even to address the sanction to be imposed for violation of Section 3161(c)(2), it is plainly inappropriate to suppose that Congress intended to abrogate the harmless error rule in this situation.[30]

Moreover, each of the sanctions set forth in the Act punishes tardiness rather than haste, and thus implements the overriding purpose of the Act. And even as to violations of the Act's central promptness requirements, Congress explicitly allowed dismissals without prejudice. There is accordingly no reason to assume that Congress required that the courts deal inflexibly with insignificant violations of Section 3161(c)(2).[31] There is simply no evidence that Congress intended that an otherwise valid conviction be overturned wholly without regard to whether the defendant's trial preparation could have been assisted by further delay, simply because the defendant was tried 29 days rather than 30 days after his first appearance with counsel.

Indeed, so far as we are aware, the legislative history of the Speedy Trial Act contains no discussion of the

---

[30] *Cf. United States* v. *Anderton*, 752 F.2d 1005, 1008 (5th Cir. 1985) (the Speedy Trial Act provides no sanction for a violation of Section 3161(j); the defendant accordingly must show that he has been prejudiced by a violation to win reversal of his conviction).

[31] It is also arguable that the structured choice of remedy with respect to violations of Sections 3161(b) and 3161(c)(1) reflected in Section 3162(a)(1) and (2) is intended to supplant a harmless error analysis there. No similar argument is available here.

appropriate sanction for a violation of Section 3161(c)(2). None of the defense attorneys who appealed to Congress in 1979 to assure adequate preparation time suggested that harmless error principles should be inapplicable in this context. See pages 28-29, *supra*. And while the Second Circuit guidelines, from which Section 3161(c)(2) is derived, did not specifically address the harmless error issue, they did allow the district court latitude to try a case within the first 30 days after an original indictment if the court found that an early trial date would "not interfere with the defendant's or Government's choice of counsel, or the parties' ability to prepare for trial without undue pressure." *1979 Senate Hearings* 393. Accordingly, they tend to suggest that an inflexible rule requiring a new trial in every case in which Section 3161(c)(2) is violated is unwarranted.

2. The Ninth Circuit has itself recognized that the Act does not specify the remedy, if any, for a violation of Section 3161(c)(2). *United States* v. *Daly*, 716 F.2d 1499, 1506 (1983) ("The Act provides no specific guidance as to the appropriate remedy in this case.").[32] But in *Daly*, which the panel in this case followed (see Pet. App. 2a), the court of appeals filled the gap in the statutory language, holding that a new trial is a proper remedy and apparently excluding consideration of harmless error (716 F.2d at 1506):

> [T]he purpose of section 3161(c)(2) is to insure that defendants are allowed sufficient time to prepare for trial. Consistent with this underlying policy, Section 3161(c)(2) essentially establishes that any pretrial preparation period shorter than 30 days is inadequate *per se*. A violation of section 3161(c)(2) thus should be treated like an erroneously denied motion for a continuance, because both of these procedural errors deny a defendant a fair trial by forcing him into court before he has had adequate time for preparation.

[32] In *Daly* the court recognized that Section 3162(c)(2), which prescribes sanctions when "a defendant is not brought to trial within the time limit required by section 3161(c) as extended by section 3161(h)," does not appear to apply to violations of Section 3161(c)(2), but ultimately found it unnecessary to decide that question. 716 F.2d at 1505-1506. The *Daly* dictum on this point is clearly correct. See *Judicial Conference Guidelines* 76 (1984). We note that Congress did not amend Section 3162(a)(2) in response to enactment of Section 3161(c)(2), and that dismissal of an indictment would be a wholly illogical remedy for any overly speedy trial.

We assume, for present purposes, that the court of appeals is correct insofar as it identified a new trial as an appropriate remedy in a typical case in which the defendant has been denied the statutorily prescribed preparation period. But the analogy that underlies the court of appeals' further conclusion that a statutory violation is "per se" reversible error is faulty and misleading. To be sure, Section 3161(c)(2) reflects Congress's judgment that the specified period of trial preparation time should be permitted by district courts without regard to whether failure to do so would in a particular case be unfairly prejudicial or would deny a defendant due process. The automatic feature of Section 3161(c)(2) thus ordinarily makes it unnecessary and inappropriate for the district courts to engage in a fact-sensitive determination as to the defendant's need for time to prepare a defense. Accordingly, it is *error* to deny the 30-day trial preparation period when required by the Act. But it does not follow that such an error may not be harmless.

Nor does the analogy to an "erroneously denied continuance" support the court of appeals' conclusion here. When not directed otherwise by the Speedy Trial Act, trial courts have considerable discretion as to whether a continuance sought by a defendant should be granted. See *United States* v. *Cronic*, No. 82-660 (May 14, 1984), slip op. 13. Thus, a ruling on the merits that discretion has been abused and that denial of a continuance was therefore "erroneous" *necessarily* imports a determination that the ruling, and thus the error, was prejudicial.

On the other hand, precisely because a violation of Section 3161(c)(2) does not depend upon any showing of prejudice, finding such a violation does not rule out the possibility of harmless error. Perhaps an appeal based on a violation of Section 3161(c)(2) does not require the defendant affirmatively to demonstrate prejudice flowing from the curtailment of pretrial preparation time. But this does not prevent the government from shouldering the burden of demonstrating harmless error.[33]

3. Any error in the present case was undeniably harmless. As we have explained (page 4), the superseding indictment merely corrected a minor typographical error creating a colorable inaccuracy as to the date of respondent's conviction on the predicate offense.[34] Re-

[33] Although this Court has recognized that there are "circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified" (*Cronic*, slip op. 10), a violation of the 30-day rule of Section 3161(c)(2) plainly is not such an instance. Indeed, in *Cronic* itself the Court rejected the view that the circumstances of the case—salient among which was the fact that defense counsel had only 25 days to prepare (slip op. 15)—"mandated an inference that counsel was unable to discharge his duties" (*id.* at 9). See slip op. 9-18. *Cronic*, together with *Avery* v. *Alabama*, 308 U.S. 444 (1940), and *Chambers* v. *Maroney*, 399 U.S. 42, 54 (1970), confirm that prejudice is not so certain to flow from any infringement of a 30-day preparation period as to obviate a harmless error inquiry. Thus, contrary to the Ninth Circuit's view expressed in *Daly*, 716 F.2d at 1506, it is fallacious to assume that a violation of Section 3161(c)(2), like an erroneously denied continuance, necessarily "den[ies] a defendant a fair trial by forcing him into court before he has had adequate time for preparation." It is also noteworthy that juvenile delinquency charges must be tried within 30 days of incarceration, if the juvenile is detained prior to trial. 18 U.S.C. 5036. Congress obviously did not believe that juveniles would be prejudiced by such expeditious proceedings or that they would have inadequate trial preparation time.

[34] In point of fact, neither the original indictment nor the superseding indictment purported to state the exact date of the predicate

spondent and his counsel had every reason to know, from the outset, the correct date of the conviction on the predicate offense. In any event, the superseding indictment simply conformed the indictment to the disclosure made to respondent's counsel long in advance of the scheduled trial date. It contained no surprises and added no charges. It did not increase the defendant's burden, open up new lines of possible defense, or affect the ability of respondent and his counsel to be ready for trial in any manner. There is no conceivable basis for claiming that the typographical error in the original indictment in any way impeded respondent's trial preparation, or that the return of the superseding indictment correcting the error disrupted ongoing preparation. Accordingly, respondent, who was afforded 60 days of preparation time from arraignment to trial, suffered no possible injury from any violation of the Speedy Trial Act that may have occurred here. Thus any such violation should have been deemed harmless, and respondent's conviction should have been affirmed.

Significantly, respondent has never even claimed that the superseding indictment created any *need* for a continuance because of some alteration in the charge. Instead, respondent's counsel simply "demanded" a 30-day continuance after the prosecutor advised him of the Ninth Circuit's decision in *Arkus*. At his arraignment on the superseding indictment, respondent did suggest that he needed additional preparation time. See pages 5-6, *supra*. But the reasons given cannot furnish a basis for holding that the denial of his Section 3161(c)(2) motion was reversible error because they are wholly unrelated to the return of the superseding indictment.

conviction. Rather, the original indictment stated that the prior judgment of conviction was entered "on or about December 17, 1981," whereas the superseding indictment substitutes the phrase "on or about December 7, 1981" (E.R. 4, 7).

In any event, the district court did not abuse its discretion in denying a continuance here.[35]

b. That any violation of Section 3161(c)(2) in this case should be deemed harmless is especially clear because the defendant was afforded more than the 30 days required by the statute between his arraignment on the original indictment and the commencement of trial on the superseding indictment. Arguably the nature of the statutory right involved makes it difficult in most cases to assess claims of harmless error—as for instance when the defendant is tried on the 29th day instead of the 30th following an original indictment. But that difficulty largely evaporates when the defendant has at least once been afforded a full 30 days' preparation time. In such cases the court is not required to make the somewhat subjective determination that a shortfall of a certain magnitude in preparation time should be deemed de minimis. Rather, the court need consider only whether the nature of the change in the indictment is such that there simply was no need for additional preparation time.

A claim of inadequate preparation time in connection with a superseding indictment is distinctive in another respect as well, at least where, as here, it was not even necessary to resort to a superseding indictment. Rather than resubmitting the case to the grand jury, under

[35] Respondent claimed, first, that he was not prepared to defend Count 2 because he needed additional time to review his immigration file. But the district court accepted the government's responsive offer to dismiss Count 2 and thereby mooted respondent's plea for extra time on that score. See page 6, *supra*.

Respondent also claimed that he needed time to secure a fingerprint expert who could determine if he was, in fact, the same person who was convicted of illegal entry on December 7, 1981. Because the court made reasonable efforts to accommodate respondent in this regard without postponing trial (see page 6, *supra*), and because respondent ultimately decided to stipulate that he was indeed the person convicted of the predicate offense on December 7, 1981, the district court's ruling cannot be faulted.

Ninth Circuit precedent the prosecutor could have asked the district court simply to "amend" the original indictment to correct the typographical error.[36] And because there is no need for rearraignment following such an amendment, it is inconceivable that Section 3161(c)(2) would have any further application in such a case. Alternatively, the government could simply have proceeded to trial without correcting the typographical error. Because the indictment did not even purport to state the exact date of the predicate conviction, and because the discrepancy was only ten days, the variance between the indictment and the proof would surely have been deemed immaterial.[37] Particularly in the context of a harmless error analysis, it is no answer to observe, as the court of appeals did (Pet. App. 2a), that the government is bound by its decision to seek reindictment rather than pursuing either of these alternative courses. Given the ready availability of these alternatives there can be no contention that respondent was deprived of a substantial right here.

[36] See, *e.g.*, *United States* v. *Dawson*, 516 F.2d 796, 799-804, cert. denied, 423 U.S. 855 (1975); *United States* v. *Buble*, 440 F.2d 405, cert. denied, 404 U.S. 828 (1971).

[37] See, *e.g.*, *United States* v. *Cochran*, 697 F.2d 600, 604-605 (5th Cir. 1983); *United States* v. *Ward*, 676 F.2d 94, 96-97 (4th Cir.), cert. denied, 459 U.S. 835 (1982); *United States* v. *Alien*, 596 F.2d 227, 231 (7th Cir.), cert. denied, 444 U.S. 871 (1979); *United States* v. *Wright*, 573 F.2d 681, 685 (1st Cir.), cert. denied, 436 U.S. 949 (1978).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

ANDREW L. FREY
Deputy Solicitor General

JOSHUA I. SCHWARTZ
Assistant to the Solicitor General

PATTY MERKAMP STEMLER
Attorney

MAY 1985

STATUTORY APPENDIX

Pertinent provisions of the Speedy Trial Act of 1974, as amended, 18 U.S.C. 3161 *et seq.*, provide:

§ 3161. Time limits and exclusions

(a) In any case involving a defendant charged with an offense, the appropriate judicial officer, at the earliest practicable time, shall, after consultation with the counsel for the defendant and the attorney for the Government, set the case for trial on a day certain, or list it for trial on a weekly or other short-term trial calendar at a place within the judicial district, so as to assure a speedy trial.

(b) Any information or indictment charging an individual with the commission of an offense shall be filed within thirty days from the date on which such individual was arrested or served with a summons in connection with such charges. If an individual has been charged with a felony in a district in which no grand jury has been in session during such thirty-day period, the period of time for filing of the indictment shall be extended an additional thirty days.

(c)(1) In any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs. If a defendant consents in writing to be tried before a magistrate on a complaint, the trial shall commence within seventy days from the date of such consent.

(2) Unless the defendant consents in writing to the contrary, the trial shall not commence less than thirty days from the date on which the defendant first appears through counsel or expressly waives counsel and elects to proceed pro se.

(d)(1) If any indictment or information is dismissed upon motion of the defendant, or any charge contained in a complaint filed against an individual is dismissed or otherwise dropped, and thereafter a complaint is filed against such defendant or individual charging him with the same offense or an offense based on the same conduct or arising from the same criminal episode, or an information or indictment is filed charging such defendant with the same offense or an offense based on the same conduct or arising from the same criminal episode, the provisions of subsections (b) and (c) of this section shall be applicable with respect to such subsequent complaint, indictment, or information, as the case may be.

(2) If the defendant is to be tried upon an indictment or information dismissed by a trial court and reinstated following an appeal, the trial shall commence within seventy days from the date the action occasioning the trial becomes final, except that the court retrying the case may extend the period for trial not to exceed one hundred and eighty days from the date the action occasioning the trial becomes final if the unavailability of witnesses or other factors resulting from the passage of time shall make trial within seventy days impractical. The periods of delay enumerated in section 3161(h) are excluded

in computing the time limitations specified in this section. The sanctions of section 3162 apply to this subsection.

(e) If the defendant is to be tried again following a declaration by the trial judge of a mistrial or following an order of such judge for a new trial, the trial shall commence within seventy days from the date the action occasioning the retrial becomes final. If the defendant is to be tried again following an appeal or a collateral attack, the trial shall commence within seventy days from the date the action occasioning the retrial becomes final, except that the court retrying the case may extend the period for retrial not to exceed one hundred and eighty days from the date the action occasioning the retrial becomes final if unavailability of witnesses or other factors resulting from passage of time shall make trial within seventy days impractical. The periods of delay enumerated in section 3161(h) are excluded in computing the time limitations specified in this section. The sanctions of section 3162 apply to this subsection.

* * * * *

(h) The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:

* * * * *

(6) If the information or indictment is dismissed upon motion of the attorney for the Government and thereafter a charge is filed against the defendant for the same offense, or any offense required to be joined with that offense, any pe-

riod of delay from the date the charge was dismissed to the date the time limitation would commence to run as to the subsequent charge had there been no previous charge.

* * * * *

(8)(A) Any period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.

(B) The factors, among others, which a judge shall consider in determining whether to grant a continuance under subparagraph (A) of this paragraph in any case are as follows:

(i) Whether the failure to grant such a continuance in the proceeding would be likely to make a continuation of such proceeding impossible, or result in a miscarriage of justice.

(ii) Whether the case is so unusual or so complex, due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law, that

it is unreasonable to expect adequate preparation for pretrial proceedings or for the trial itself within the time limits established by this section.

(iii) Whether, in a case in which arrest precedes indictment, delay in the filing of the indictment is caused because the arrest occurs at a time such that it is unreasonable to expect return and filing of the indictment within the period specified in section 3161(b), or because the facts upon which the grand jury must base its determination are unusual or complex.

(iv) Whether the failure to grant such a continuance in a case which, taken as a whole, is not so unusual or so complex as to fall within clause (ii), would deny the defendant reasonable time to obtain counsel, would unreasonably deny the defendant or the Government continuity of counsel, or would deny counsel for the defendant or the attorney for the Government the reasonable time necessary for effective preparation, taking into account the exercise of due diligence.

(C) No continuance under paragraph (8)(A) of this Subsection shall be granted because of general congestion of the court's calendar, or lack of diligent preparation or failure to obtain available witnesses on the part of the attorney for the Government.

* * * * *

§ 3162. Sanctions

(a)(1) If, in the case of any individual against whom a complaint is filed charging such

individual with an offense, no indictment or information is filed within the time limit required by section 3161(b) as extended by section 3161 (h) of this chapter, such charge against that individual contained in such complaint shall be dismissed or otherwise dropped. In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice.

(2) If a defendant is not brought to trial within the time limit required by section 3161 (c) as extended by section 3161(h), the information or indictment shall be dismissed on motion of the defendant. The defendant shall have the burden of proof of supporting such motion but the Government shall have the burden of going forward with the evidence in connection with any exclusion of time under subparagraph 3161 (h)(3). In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice. Failure of the defendant to move for dismissal prior to trial or entry of a plea of guilty or nolo contendere shall constitute a waiver of the right to dismissal under this section.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1985 461531 10214

Supreme Court, U.S.
FILED
JUL 17 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 84-1023

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA,
Petitioner,

v.

FERNANDO ROJAS-CONTRERAS,
Respondent.

On Writ Of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

BRIEF OF THE RESPONDENT

JUDY CLARKE
Federal Defenders of San Diego, Inc.
101 West Broadway, Suite 440
San Diego, California 92101-8297
(619) 234-8467
Counsel for Respondent
Appointed by this Court

PRESS OF RAM PRINTING, HYATTSVILLE, MD 20781 (301) 864-6662

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether a defendant can be forced to trial on a superseding indictment in less than the thirty-day minimum defense preparation period guaranteed by 18 U.S.C. §3161(c)(2)?

2. Whether forcing a defendant to trial in violation of the specific and rigid mandate of Congress which guarantees a thirty-day minimum defense preparation period can ever be deemed harmless error?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
JUDGMENT BELOW	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
Arrest, Presentment, Indictment	2
Superseding Indictment	3
Trial	8
SUMMARY OF ARGUMENT	10
Argument	14
I. THE SPEEDY TRIAL ACT GUARANTEES THAT A DEFENDANT CANNOT BE FORCED TO TRIAL IN LESS THAN THIRTY DAYS FROM THE DATE THE DEFENDANT FIRST APPEARS THROUGH COUNSEL ON THE INDICTMENT ON WHICH TRIAL ULTIMATELY COMMENCES	14
The History and Purpose of 18 U.S.C. §3161(c)(2)	14
Statutory Interpretation of 3161(c)(2)	19
Practical Interpretation of 3161(c)(2)	22
18 U.S.C. §3161(d)(1), (h)(6) and (h)(8)(B)(iv) are not Applicable to this Case	27
3161(c)(2) Also Applies to a Superseding Indictment Filed After the Original Indictment has been Dismissed	35
II. FORCING A DEFENDANT TO GO TO TRIAL IN VIOLATION OF 18 U.S.C. §3161(c)(2) CAN NEVER BE DEEMED HARMLESS ERROR	40
CONCLUSION	48
APPENDIX	1a

TABLE OF AUTHORITIES

	Page
Barker v. *Wingo*, 407 U.S. 514 (1972)	44
Bell v. *United States*, 349 U.S. 81 (1955)	21
Bollenbach v. *United States*, 326 U.S. 607 (1946)	42
Boykin v. *Alabama*, 395 U.S. 238 (1969)	24
Cabell v. *Markham*, 148 F.2d 737 (2d Cir.) (Hand, J.), *aff'd*, 326 U.S. 404 (1945)	22
Carpenters v. *United States*, 330 U.S. 395 (1947)	41, 42, 46
Chapman v. *California*, 386 U.S. 18 (1967)	41
Connecticut v. *Johnson*, 460 U.S. 73 (1983)	41
Cuyler v. *Adams*, 449 U.S. 433 (1981)	38
Ex parte Bain, 121 U.S. 1 (1887)	7
Gideon v. *Wainwright*, 372 U.S. 335 (1963)	41
Hamling v. *United States*, 418 U.S. 87 (1974)	41
Jackson v. *Virginia*, 443 U.S. 307 (1979)	41
Liparota v. *United States*, 105 S.Ct. 2084 (1985)	21
Kotteakos v. *United States*, 328 U.S. 750 (1946)	41
Marbury v. *Madison*, 1 Cranch 137 (1803)	44
Payne v. *Arkansas*, 356 U.S. 560 (1958)	41
Perrin v. *United States*, 444 U.S. 37 (1979)	22, 29
Rewis v. *United States*, 401 U.S. 808 (1971)	21
Russello v. *United States*, 464 U.S. 16 (1983)	29
Sandstrom v. *Montana*, 442 U.S. 510 (1979)	41
Time, Inc., v. *Regan*, 468 U.S. ____, 104 S.Ct. 3262 (1984)	39
Tumey v. *Ohio*, 273 U.S. 510 (1927)	41
United States v. *Arambula-Alvarado*, 677 F.2d 51 (9th Cir. 1982)	2, 24
United States v. *Arkus*, 675 F.2d 245 (9th Cir. 1982)	5, 7, 8, 20, 22, 24
United States v. *Burton*, 584 F.2d 485 (D.C. Cir. 1978), *cert. denied*, 439 U.S. 1069 (1979)	44
United States v. *Campbell*, 706 F.2d 1138 (11th Cir. 1983)	34
United States v. *Clifford*, 664 F.2d 1090 (8th Cir. 1981)	34
United States v. *Daly*, 716 F.2d 1499 (9th Cir. 1983)	9, 45
United States v. *Dawson*, 516 F.2d 796 (9th Cir.), *cert. denied*, 423 U.S. 855 (1975)	7
United States v. *Dennis*, 625 F.2d 782 (8th Cir. 1980)	33
United States v. *Feldman*, 761 F.2d 380 (7th Cir. 1985)	20, 29, 34, 35

TABLE OF AUTHORITIES Continued

Page

United States v. *Gallo*, No. 83-3288 (6th Cir. May 29, 1985) 20
United States v. *Gasca-Kraft*, 522 F.2d 149 (9th Cir. 1975) 6
United States v. *Gradwell*, 243 U.S. 476 (1917) 21
United States v. *Guzman*, 754 F.2d 482 (2d Cir.), *petition for cert. filed*, 53 U.S.L.W. 3759 (U.S. Apr. 9, 1985) (No. 84-1604) 19, 20, 25, 30
United States v. *Harris*, 724 F.2d 1452 (9th Cir. 1984) 9, 19, 20, 22
United States v. *Hasting*, 461 U.S. 499 (1983) 41
United States v. *Heldt*, 745 F.2d 1275 (9th Cir. 1984) ... 35
United States v. *Hencye*, 505 F.Supp. 968 (N.D. Fla. 1981) 36
United States v. *Henderson*, 746 F.2d 619 (9th Cir. 1984), *petition for cert. filed*, 53 U.S.L.W. 3826 (U.S. May 6, 1985) (No. 84-1744) 34
United States v. *Horton*, 676 F.2d 1165 (7th Cir. 1982), *cert. denied*, 459 U.S. 1201 (1983) 20-21, 34, 35
United States v. *McCown*, 711 F.2d 1441 (9th Cir. 1983) 36
United States v. *Naftalin*, 441 U.S. 768 (1979) 18
United States v. *Ortiz-Martinez*, 557 F.2d 214 (9th Cir. 1977) 6
United States v. *Pollock*, 726 F.2d 1456 (9th Cir. 1984) .. 35
United States v. *Pringle*, 751 F.2d 419 (1st Cir. 1984) ... 34
United States v. *Rabb*, 680 F.2d 294 (3d Cir.), *cert. denied*, 459 U.S. 873 (1982) 22
United States v. *Rangel-Gonzales*, 617 F.2d 529 (9th Cir. 1980) 6
United States v. *Richmond*, 735 F.2d 208 (6th Cir. 1984) 21-22
United States v. *Rush*, 738 F.2d 497 (1st Cir. 1984), *cert. denied*, 105 S.Ct. 1355 (1985) 19, 21, 34
United States v. *Sebastian*, 428 F.Supp. 967 (W.D.N.Y.), *aff'd on other grounds*, 562 F.2d 211 (2d Cir. 1977) . 34
United States v. *Timmreck*, 441 U.S. 780 (1979) 24
United States v. *Todisco*, 667 F.2d 255 (2d Cir. 1981), *cert. denied*, 455 U.S. 906 (1982) 19
United States v. *Wilks*, 629 F.2d 669 (10th Cir. 1980) ... 36

TABLE OF AUTHORITIES Continued

Page

United States v. *Williford*, No. 83-1376, *cert. denied*, 105 S.Ct. 270 (1984) 19
United States v. *Wong Kim Bo*, 472 F.2d 720 (5th Cir. 1972) 30
United States v. *Wooten*, 688 F.2d 941 (4th Cir. 1982) 20, 36

CONSTITUTIONAL PROVISIONS
U.S. Const. amend. VI 1, 23, 25, 39, 44

STATUTES
Title 8, U.S.C. §
1325 ..... 1, 2, 6, 9, 25
1326 ..... 2, 6, 7
Title 18 U.S.C. §
3161 10
3161(b) 32, 34, 35, 45
3161(c)(1) 11, 15, 19, 20, 30, 33, 39
3161(c) (1974) 15
3161(c)(2) ..... *passim*
3161(d)(1) ..... *passim*
3161(d)(2) 15
3161(h)(1) 15
3161(h)(6) ..... *passim*
3161(h)(7) 37
3161(h)(8) 38
3161(h)(8)(B)(iii) 32, 37
3161(h)(8)(B)(iv) ..... *passim*
3161(h)(9) 15
3162 ..... 45, 46
Title 28, U.S.C. § 2111 41

RULES
Fed. R. Crim. P. 48(b) 12, 32
Fed. R. Crim. P. 50(b) 44
Fed. R. Crim. P. 52 41

TEXTS
R.L. Misner, *Speedy Trial—Federal and State Practice* (1983) 15
R. Traynor, *The Riddle of Harmless Error* (1970) 42

TABLE OF AUTHORITIES Continued

Page

ARTICLES

Frase, *The Speedy Trial Act of 1974*, 43 U. Chi. L. Rev. 667 (1976) 36

Misner, *District Court Compliance with the Speedy Trial Act of 1974: The Ninth Circuit Experience*, 1977 Ariz. St. L.J. 26

Partridge, *Legislative History of Title I of the Speedy Trial Act of 1974* (Federal Judicial Center 1980) 35

MISCELLANEOUS

125 Cong. Rec. 15452-15467 (June 19, 1979) 17

Comm. on the Admin. of the Criminal Law of the Judicial Conference of the United States, *Guidelines to the Administration of the Speedy Trial Act of 1974, as amended* (rev. 1979 with amendments through Aug. 1981 and Apr. 1983 and rev. 1979 with amendments through Oct. 1984) 30

H.R. Rep. No. 390, 96th Cong., 1st Sess. 1 (1979) 16

Implementation of the Speedy Trial Act, Hearings Before the Subcomm. on Crime of the House Comm. on the Judiciary, 97th Cong., 1st Sess. 64 (1981) 43

Proposed Amendments to the Speedy Trial Act of 1974: Hearings Before the Subcomm. on Crime of the House Comm. on the Judiciary, 96th Cong., 1st Sess. 2 (1979) 15-17, 26, 38

Pub. L. No. 93-619, 1974 U.S. Code Cong. & Ad. News 7401 45

S. 961 96th Cong., 1st Sess., 125 Cong. Rec. 7951 (Apr. 10, 1979) 15

S. 1028, 96th Cong., 1st Sess., 125 Cong. Rec. 8841 (Apr. 26, 1979) 15

Second Circuit Judicial Council Speedy Trial Act Coordinating Comm., *Guidelines Under the Speedy Trial Act (Jan. 16, 1979), reprinted in The Speedy Trial Act Amendments of 1979: Hearings on S. 961 and S. 1028 Before the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. 386-436 (1979) 16-18, 40, 46

Speedy Trial Act of 1974: Hearings Before the Subcomm. on Crime of the House Comm. on the Judiciary, 93d Cong., 2d Sess. (1974) 35

S. Rep. No. 212, 96th Cong., 1st Sess. 1 (1979) .... *passim*

TABLE OF AUTHORITIES Continued

Page

The Speedy Trial Act Amendments of 1979: Hearings Before the Sen. Comm. on the Judiciary on S. 961 11and S. 1028, 96th Cong., 1st Sess. 31 (1979) 14-18, 21, 43

1980-1984 Annual Report of the Director (Administrative Office of the U.S. Courts) 26

JUDGMENT BELOW

On May 23, 1983 the Respondent was sentenced to a term of imprisonment for one year and one day [R.T.S. 6; C.R. 17; DKT. 16].[1]

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . and to have the Assistance of Counsel for his defence.

Title 8, U.S.C. §1325 provides in pertinent part:

> Any alien who (1) enters the United States at any time or place other than as designated by immigration officers . . . shall, for the first commission of any such offenses, be guilty of a misdemeanor and upon conviction thereof be punished by imprisonment for not more than six months, or by a fine of not more than $500, or by both, and for a subsequent commission of any such offenses shall be guilty of a felony and upon conviction thereof shall be punished by imprisonment for not more than two years, or by a fine of not more than $1,000, or both.

The Speedy Trial Act provides in pertinent part (18 U.S.C. §3161(c)(2)):

> Unless the defendant consents in writing to the contrary, the trial shall not commence less than thirty days from the date on which the defendant first

---

[1] "R.T.S." refers to the Reporter's Transcript of the sentencing proceeding; "R.T.Tr." refers to the Reporter's Transcript of the arraignment and plea on the superseding indictment and the trial. "C.R." refers to the district court Clerk's Record filed in the court of appeals. "DKT." refers to the Docket Entries which reflect all filings in the case. The docket entries are contained in the last three pages of the Clerk's Record ("C.R." tab number "DKT").

appears through counsel or expressly waives counsel and elects to proceed pro se.

STATEMENT OF THE CASE

Arrest, Presentment, Indictment

On February 13, 1983 Respondent was arrested by agents of the United States Border Patrol. Agent William Burt arrived shortly after Respondent's apprehension and recognized him as someone he had arrested before. Respondent was taken to the Border Patrol station where he was interrogated by Border Patrol Agent Stark who was aware of Respondent's prior record of immigration law violations and his true identity [R.T.Tr. 156-162; 184-185; 261-264; 281-282]. The following day a complaint was filed charging Respondent with a violation of 8 U.S.C. §1325 (felony illegal entry) and 8 U.S.C. §1326 (reentry after deportation). The predicate conviction giving rise to the felony 1325 charge was alleged to be March 1, 1981 (copy attached as Appendix).[2] On February 18, 1983 the grand jury for the Southern District of California returned a two-count indictment charging Respondent with the two violations of the immigration laws to wit: felony illegal entry and reentry after deportation. Count one of the indictment, felony illegal entry, charged that Respondent knowingly and unlawfully entered the United States and that before said illegal entry had been convicted of the crime of illegal entry "on or about December 17, 1981" [C.R. 3].[3] The indictment was filed

[2] The charge of felony illegal entry in violation of 8 U.S.C. § 1325 requires the government to prove a valid prior conviction for illegal entry. *United States* v. *Arambula-Alvarado*, 677 F.2d 51 (9th Cir. 1982). *See infra* p. 24.

[3] Count one of the February 18, 1983 indictment is also set forth in Petitioner's Brief [hereinafter cited as Pet. Br.] at 5 n.1.

and the case assigned to a district court judge.[4] The grand jury recommended a bond in the amount of $3,000 [DKT. 3]. On the same date Respondent appeared with counsel for arraignment on the indictment and entered a not guilty plea as to both counts [DKT. 4]. On February 28, 1983 Respondent appeared before the assigned district court judge and a date of April 11, 1983 was set for hearing motions and trial setting. No motion was filed and on April 11, 1983 the case was set for trial on Tuesday, April 19, 1983 [DKT. 5-6].

Superseding Indictment

On Friday, April 15, four days before the previously scheduled trial date, the grand jury returned a superseding indictment charging Respondent with two violations of the immigration laws to wit: felony illegal entry and reentry after deportation [C.R. 8]. An order setting a corporate surety/cash bail in the amount of $3,000 as recommended by the grand jury was filed on the same date [DKT. 8]. Count one of the superseding indictment charged the February 13, 1983 felony illegal entry but changed the date for the predicate conviction from December 17, 1981 to December 7, 1981 [C.R. 3, 8].[5] The

[4] In the Southern District of California the clerk of the court makes a random assignment of a district court judge to each case when the indictment is filed. This random assignment is accomplished by the filing clerk drawing a sealed envelope, which contains the initials of a district court judge, from a box containing a designated percentage of cards for each of the judges. When either a superseding indictment or a "notice of related case" is filed, the judge originally assigned to the case is reassigned without benefit of the random selection procedure.

[5] The prosecutor referred to this change as a "typo error" [R.T.Tr. 15]. Without support or justification Petitioner [Pet. Br. at 5] asserts that defense counsel "did not deny he had been advised of the

first indictment was outstanding at the time the superseding indictment was filed and remained in existence until dismissed following Respondent's sentencing on May 23, 1983 [DKT. 16].

On Monday, April 18, 1983, one day before the trial date scheduled for the original indictment, Respondent was arraigned on the superseding indictment and entered a not guilty plea as to both counts S1 and S2 [R.T.Tr. 5-6; DKT. 9].[6] Immediately following arraignment, Respondent's counsel made a demand for the thirty-day prepara-

typographical error in the original indictment well in advance of the scheduled trial date." Petitioner ignores the fact that the prosecutor never asserted that counsel was notified of any error, the second indictment was not returned until the Friday before the Tuesday trial date and that no occasion arose for defense counsel to affirm or deny any notice of the error.

[6] Respondent was arraigned before the district court following the February 18, 1983 indictment. The arraignment was as follows:

> THE CLERK: Mr. Rojas, you are informed that a superceding indictment has now been filed charging you in one count with illegal entry, felony, and in count 2, to being a deported alien found in the United States.
>
> You are further advised you are entitled to have a trial by jury, to be represented by counsel at all stages of the proceedings before this court, and to have witnesses summoned to testify in your behalf.
>
> How do you plead to count 1 of the superceding indictment? Are you guilty or not guilty?
>
> THE DEFENDANT (through interpreter): No.
>
> THE COURT: Not guilty?
>
> THE DEFENDANT: Not guilty.
>
> THE CLERK: Not guilty. How do you plead to count 2 of the superceding indictment? Are you guilty or not guilty?
>
> THE DEFENDANT: No. Not guilty.
>
> . . . .
>
> THE COURT: Okay. This matter is set for trial tomorrow.

[R.T.Tr. 5-6] The docket entires refer to the superseding indictment counts as S1 and S2 and the counts on the first indictment as 1 and 2.

tion period provided for under the Speedy Trial Act and the Ninth Circuit's decision in *United States* v. *Arkus*.[7] Respondent's counsel informed the court that "there is a slight difficulty because with [sic] the superceding indictment" and made the demand for the thirty-day period provided under the statute and the case law.[8]

In addition to reliance upon the thirty-day defense preparation period and *United States* v. *Arkus*, defense counsel informed the court that neither the "A" file[9] nor the report of the fingerprint expert had been made available. Defense counsel informed the court that certain discovery in the case had just been made available, by way of a telephone conversation with the prosecutor, the previous Thursday and Friday [R.T.Tr. 10-12].

The prosecutor informed the court that while the "A" file would not be available until the afternoon of April 18, 1983, discovery provided on March 21, 1983 reflected the December 7, 1981 prior conviction [R.T.Tr. 15]. Respondent was not provided with a copy of his statement until

[7] 675 F.2d 245 (9th Cir. 1982).

[8] Contrary to Petitioner's assertion [Pet. Br. at 5 n.3], the record does not reflect that defense counsel was unaware of the decision in *United States* v. *Arkus* before the prosecutor called attention to it. The record reflects that defense counsel stated "as counsel for the government knows, I've already apprised him, and I think the court is aware of the Arcus (phonetic) decision of the Ninth Circuit, A-R-C-U-S [sic]. I have a copy if the court would need to be refreshed with it." [R.T.Tr. 6]

[9] The "A" file is a comprehensive file maintained by the Immigration and Naturalization Service which contains information regarding any and all immigration service contacts with the alien including reports of prior convictions and deportations [R.T.Tr. 10, 21]. The trial court apparently initially believed that the "A" file contained only deportation records until defense counsel corrected the misapprehension [R.T.Tr. 21].

March 31, 1983 [R.T.Tr. 17].[10] The government took the position that the Respondent had not been prejudiced in any way and that defense counsel had "access" to the dates of the convictions and "certainly an opportunity" to prepare [R.T.Tr. 18]. When the court wanted to hear further about the "A" file, the prosecutor stated that if the court had a "problem" with the fact defense counsel had not seen the file the government had no objection to dismissing count two.[11] Count S2 was dismissed by the court as a condition of the denial of the motion to continue [R.T.Tr. 23, DKT. 9].

Defense counsel's concern that necessary reports relating to prior similar acts would be found in the "A" file was countered by the prosecutor's *submission* that "any reports in the 'A' file would be no more than the reports provided to counsel" in connection with previous cases involving Respondent.[12] The court found it would be

[10] It is notable that according to Petitioner's calculations and theory of argument the defense preparation period guaranteed by 18 U.S.C. § 3161(c)(2) expired on March 20, 1983, one day before discovery was provided with respect to Respondent's December 7 prior conviction and eleven days before Respondent was provided with a copy of his statement [Pet. Cert. at 9].

[11] In the Ninth Circuit, a collateral attack on the legality of the deportation which forms the basis for the 8 U.S.C. § 1326 violation is permitted. *United States* v. *Gasca-Kraft*, 522 F.2d 149 (9th Cir. 1975); *United States* v. *Rangel-Gonzales*, 617 F.2d 529 (9th Cir. 1980). The prosecutor moved to dismiss rather than try to provide "adequate discovery in the eleventh hour before trial" stating that the dismissal motion was made "because the government cannot realize any additional time in custody in regards to count two" [R.T.Tr. 18]. *See United States* v. *Ortiz-Martinez*, 557 F.2d 214 (9th Cir. 1977) (cumulative punishments for single transaction violating both 8 U.S.C. § 1325 and 8 U.S.C. § 1326 prohibited).

[12] According to the prosecutor, in two cases Respondent had been

improper to start trial on S2 (8 U.S.C. §1326), the count identical to count two of the first indictment, without a review of the "A" file, but that in regard to the prior act problems raised by the proof of S1, it would be "speculative" that the deportation file contained more than the discovery provided to counsel. The court relied on the fact that "clearly on two and probably on three" occasions Federal Defenders represented Respondent [R.T.Tr. 26]. Defense counsel informed the court he only had some of the reports [R.T.Tr. 21].

With respect to the thirty-day defense preparation period of 18 U.S.C. §3161(c)(2), the prosecutor took the position that *United States* v. *Arkus* was distinguishable. The prosecutor argued that the defendant had not shown prejudice and that a superseding indictment was not even required because the indictment could have been amended [R.T.Tr. 18-20].[13] Finding that the first issue before the court was prejudice to the defendant by virtue of trial on the superseding indictment one day after

represented by other attorneys with Federal Defenders of San Diego two years earlier. The prosecutor spoke with "some reasonable certainty" that Respondent had been represented by Federal Defenders on the third case in 1981 also [R.T.Tr. 22]. The prosecutor imputed knowledge of and control over the discovery reports by virtue of this prior representation without any basis that such discovery had been provided in the earlier cases.

[13] The prosecutor relied upon *United States* v. *Dawson*, 516 F.2d 796 (9th Cir.), *cert. denied*, 423 U.S. 855 (1975), for this proposition. In *Dawson*, the Ninth Circuit affirmed one of the exceptions to *Ex parte Bain*, 121 U.S. 1 (1887), that "corrections of typographical errors or making changes that are 'merely a matter of form' are not constitutionally impermissible." *Id.* at 801. However, *Dawson* authorized the striking of surplusage whereas in Respondent's case the grand jury changed a date affecting the enhancement element of the offense. *See infra* p. 24.

arraignment, the trial court resolved that the change in count one was not significant and caused no significant problem [R.T.Tr. 24]. The court also found *Arkus* distinguishable [R.T.Tr. 25].

Trial

Trial began as ordered on the next day, April 19, 1983. Defense counsel stipulated to Respondent's identity and alienage on the date of his arrest [R.T.Tr. 59-69]. There was no stipulation that the December 7, 1981 prior conviction, used as a basis to form the felony charge in S1, was correct [R.T.Tr. 68]. During the discussions regarding the stipulations defense counsel expressed confusion over the nature of the charge and the precise prior conviction the government intended to use [R.T.Tr. 60]. The court stated "they're using the conviction from the September 20, 1981 arrest for illegal entry" but the prosecutor acknowledged the existence of two judgment and commitments on December 7, 1981 [R.T.Tr. 60-61].

Evidence at trial revealed that Respondent was arrested near the Otay Lake located four to five miles north of the United States-Mexico border. He was found with a group of other people who stated they were from Mexico. The physical appearance of the people, including Respondent, indicated a recent crossing from Mexico. Respondent was recognized from a prior arrest and ultimately admitted to entering the United States earlier on February 13, 1983 without inspection as well as his previous arrest for illegal entry [R.T.Tr. 160-220].

The jury was instructed that three essential elements were required to establish the offense: alienage at the time alleged in the indictment, knowing and unlawful entry on or about February 13, 1983, and a previous conviction for illegal entry in the United States District

Court for the Southern District of California [R.T.Tr. 321]. The jury was further instructed that if it was unable to unanimously agree on the felony charge it should consider whether Mr. Rojas was guilty of the lesser included offense of misdemeanor illegal entry [R.T.Tr. 322]. The jury was instructed that the two elements of misdemeanor illegal entry were: alienage and knowing and unlawful entry on or about February 13, 1983.[14]

Respondent was convicted by the jury on April 20, 1983 [R.T.Tr. 332]. On May 23, 1983 Respondent was sentenced to a term of imprisonment of one year and one day [R.T.S. 7; C.R. 17]. The Ninth Circuit Court of Appeals, in an unpublished memorandum decision, reversed Respondent's conviction relying upon its earlier decisions in *United States* v. *Harris*, 724 F.2d 1452 (9th Cir. 1984), and *United States* v. *Daly*, 716 F.2d 1499, 1506 (9th Cir. 1983). The court held that

> section 3161(c)(2) of the Speedy Trial Act guarantees that a defendant will not be forced to trial less than thirty days from the date on which the defendant first appears *on the indictment on which the defendant ultimately goes to trial.*

[Pet. Cert. at 1a-2a (emphasis added)]

The court found Rojas-Contreras was entitled to an additional defense preparation period after arraignment on the superseding indictment and that no prejudice need be shown [Pet. Cert. at 2a].

---

[14] Thus, if the jury disagreed as to the third element of felony illegal entry—the previous conviction as charged in the indictment—it could acquit of the greater offense and convict of the lesser included offense of misdemeanor illegal entry. At the time, the maximum penalty for felony illegal entry was two years and/or a fine of $1,000 and for misdemeanor illegal entry six months and/or a fine of $500. 8 U.S.C. § 1325.

SUMMARY OF ARGUMENT

I.

The minimum mandatory defense preparation period, codified in 18 U.S.C. §3161(c)2), applies to all indictments. As a result a defendant cannot be forced to trial in less than thirty days from the first appearance through counsel on the indictment upon which trial ultimately commences.

In 1979 Congress amended the Speedy Trial Act and added the thirty-day minimum mandatory defense preparation period which is at issue in this case. The intent of Congress was to provide defendants with a minimal period of time to prepare "even in the simplest case" and to avoid having defendants forced to trial too quickly. After over four years of experience with the Speedy Trial Act, 18 U.S.C. §§3161, *et seq.*, Congress realized that criminal defendants were unduly burdened by certain provisions of the Act. As a result, it enacted the minimum defense preparation period of 3161(c)(2) in order to prevent the Speedy Trial Act from becoming the "Speedy Conviction Act." At the same time and separate and distinct from the preparation period contained in 3161(c)(2), Congress added an "ends of justice" exclusion which could be used to extend the seventy-day limit to trial (3161(h)(8)(B)(iv)) upon a determination by the court that a defendant in a noncomplex case needed additional time to prepare.

Two provisions of the Speedy Trial Act of 1974 which were untouched by the 1979 amendments respond to situations where an indictment is dismissed and a later indictment is filed charging either 1) "the same offense or an offense based on the same conduct or arising from the same criminal episode" (3161(d)(1)) or 2) "the same

offense or any offense required to be joined with that offense" (3161(h)(6)). However, neither section deals with superseding indictments or indictments filed while the original indictment is still pending. In fact, superseding indictments are neither defined nor discussed in the statutory scheme of the Speedy Trial Act or in the federal criminal code.

Title 18 U.S.C. §3161(d)(1) provides that the seventy-day speedy trial clock starts over after a successful defense motion to dismiss an indictment where the government refiles an indictment charging "the same offense or an offense based on the same conduct or arising from the same criminal episode." Title 18 U.S.C. §3161(h)(6) provides that the time between dismissal of the indictment by the government and refiling of "the same offense or any offense required to be joined with that offense" is excludable time tolling the seventy-day speedy trial clock. Neither of these sections control the situation where there is no gap between the two indictments or where the original indictment remains in existence until after resolution of the superseding indictment. Instead, the plain language of 3161(c)(1) controls in those circumstances. The plain language of the section requires that "[i]n *any* case in which a plea of not guilty is entered, the trial of a defendant charged in *an* . . . indictment . . . shall commence within seventy days from the filing date . . . [or the date the defendant appears before a judicial officer, whichever is last] . . ." (emphasis added).

Applying both 3161(c)(1) (seventy-day time limit) and (c)(2) (thirty-day mandatory defense preparation period) to all indictments, including superseding indictments, avoids the problem that the seventy-day time limit to trial could be violated if the superseding indictment was filed after the fortieth nonexcludable Speedy Trial Act day.

While there is a minimal opportunity for abuse by the government continually filing superseding indictments in order to avoid the Speedy Trial Act's outer time limits, application of Fed. R. Crim. P. 48(b) (dismissal for unnecessary delay in bringing a defendant to trial) would control any such potential for abuse. Such an application effectuates the purpose of 3161(c)(2) by relieving the defendant of the burden of convincing a court of the *need* for a minimal time to prepare.

The mandatory defense preparation period must also apply in situations where the government dismisses an indictment shortly before filing a subsequent or superseding indictment (and thus where 3161(h)(6) is applicable). To hold otherwise places complete control over a defendant's time to prepare either in the hands of the government or the court. Congress enacted 3161(c)(2) specifically to place control over a minimum preparation period in the hands of the defendant, not the government or the court. If the government chooses to dismiss and refile (and thereby activate the exclusion provisions of 3161(h)(6)) after the fortieth nonexcludable day, then it must logically bear the burden of obtaining an "ends of justice" exclusion to enable the defendant to assert the thirty-day minimum defense preparation period. The government, and not the defendant, must be accountable for its own failure to supersede or file subsequent charges in compliance with the time provisions of the Speedy Trial Act. An alternate, yet still consistent interpretation of the interaction of 3161(c)(2) and (h)(6), is that an "ends of justice" exclusion automatically excludes the minimum defense preparation period from the seventy-day clock upon the filing of a superseding indictment.

The filing of a superseding indictment may force a defendant into the position of needing time to reflect and

evaluate the impact of even what appears to be an insignificant change, addition or deletion in the indictment. In those situations where additional time is not required, the defendant will likely consent to trial in less than the thirty-day minimum preparation period. The fact that the government decides to seek a subsequent or superseding indictment in itself reflects some intended impact on the case. Although in Respondent's case the government suggested the superseding indictment merely corrected a "typo error," the change in dates took away the possibility of an acquittal on the felony charge, thereby putting the defendant in a position of reviewing the case for alternate defenses. The government determined that the superseding indictment was necessary or presumably it would not have taken valuable grand jury time to re-present the same case. By the same reasoning, there is necessarily an impact upon the defendant's case which causes a need to evaluate the superseding indictment and possibly either negotiate a disposition or even prepare another defense. Congress intended to grant the defendant the absolute right to assert a minimum mandatory defense preparation period without having to express prejudice or convince a court to exercise its discretion to grant the time to prepare.

To expect a defendant to prepare for trial based on all potential and not actual charges ignores the realities of representing a criminal defendant. Counsel can only reasonably prepare to meet specific charges and not all potential charges or problems raised by pre-trial discovery.

II.

The harmless error rule cannot apply to violations of the rigid statutory requirement of 18 U.S.C. §3161(c)(2) which guarantees a minimum defense preparation period.

Congress created a bright line rule which if subjected to an application of the harmless error rule would be null and void. There are certain errors, including violations of strict standards of Congress, that require automatic reversal because the impact of the error is impossible to determine. By providing for a precise thirty-day minimum mandatory defense preparation period which a defendant alone can assert or waive, Congress presumed that any violation would be harmful or prejudicial. To permit a case by case analysis of the harm resulting from a violation of this rigid thirty-day rule would allow the district courts and prosecutors to overcome the intent of Congress as well as the plain meaning of 3161(c)(2). There is no reason for a court to violate the thirty-day minimum period for there is no discretion involved in its interpretation or application.

ARGUMENT

I.

THE SPEEDY TRIAL ACT GUARANTEES THAT A DEFENDANT CANNOT BE FORCED TO TRIAL IN LESS THAN THIRTY DAYS FROM THE DATE THE DEFENDANT FIRST APPEARS THROUGH COUNSEL ON THE INDICTMENT ON WHICH TRIAL ULTIMATELY COMMENCES.

The History and Purpose of 18 U.S.C. §3161(c)(2)

Title 18 U.S.C. §3161(c)(2) was added to the Speedy Trial Act in July 1979 amidst the government's push to expand and reconfigure the time limits of the Act or in the alternative to delay the effective date of the sanction provisions of the Act.[15] Ultimately Congress delayed the

[15] *See The Speedy Trial Act Amendments of 1979: Hearings Before the Senate Comm. on the Judiciary on S. 961 and S. 1028*, 96th Cong., 1st Sess. 31, 49 (1979) [hereinafter cited as 1979 Senate

effective date of the sanction provisions one year (from July 1, 1979 to July 1, 1980) but rejected the request of the Department of Justice to enlarge the time from the filing of charges to trial from 60 to 120 days.[16]

The "defense preparation period," as 18 U.S.C. §3161(c)(2) has become known, was contained in the proposed amendments suggested by the Department of Justice as well as the Judicial Conference and provided that "[t]he trial of a defendant shall not commence less than thirty days from the date specified in paragraph (1) without the consent of the defendant."[17] According to the

Hearings] (statement of Assistant U.S. Attorney General Phillip B. Heyman); *id.* at 149 (letter of Benjamin R. Civiletti, Deputy Attorney General); *id.* at 728-29 (letter of Attorney General Griffin Bell); *id.* at 4-15 (S. 961 and S. 1028 as submitted Apr. 10, 1979 and Apr. 26, 1979, respectively); *Proposed Amendments to the Speedy Trial Act of 1974: Hearings Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 96th Cong., 1st Sess. 2 (1979) [hereinafter cited as 1979 House Hearings]; R.L. Misner, *Speedy Trial—Federal and State Practice* 215 (1983).

[16] The 1979 amendments merged the indictment to arraignment (ten days) and arraignment to trial (sixty days) time periods contained in the 1974 Act (18 U.S.C. § 3161(c) (1974)) into one seventy-day period. *See* 18 U.S.C. 3161(c)(1) (1979). The amendments also added 3161(c)(2) (the defense preparation period), 3161(d)(2) (time for retrial after appeal), 3161(h)(8)(B)(iv) (ends of justice continuance in a noncomplex case for continuity of counsel and trial preparation), 3161(h)(9) (delay to obtain foreign evidence), and made certain other changes in the automatic exclusion provisions in 3161(h)(1).

[17] *See* S. 961, 96th Cong., 1st Sess., 125 Cong. Rec. 7951 (Apr. 10, 1979); S. 1028, 96th Cong., 1st Sess., 125 Cong. Rec. 8841 (Apr. 26, 1979). "[P]aragraph (1)" referred to the later date of the filing of the indictment or appearance before a judicial officer of the court in which the charge was pending. *Id.* The Department of Justice supported a thirty-day minimum time limit "after indictment or [the defendant's] appearance before an officer of the court. . . ." 1979 House

Department of Justice it was

> [i]n recognition of the special problems often faced by defense counsel . . . [that the Depatment requires] a minimum of thirty days for defense preparation. This insures the defendant of some minimum preparation time even in the simplest case.[18]

The language of subsection (c)(2) was changed before final passage to delete the reference to "paragraph (1)" and provide that the thirty-day defense preparation period would run "from the date on which the defendant first appears through counsel or expressly waives counsel and elects to proceed pro se."[19] This modification in the language provided for a more liberal construction of the start of the defense preparation period. Sen. Report 212, *supra* note 19, at 32. In recognizing that the "appears through counsel" language was similar to the comparable provision in the Department of Justice and Judicial Conference bills, the Senate Committee on the Judiciary found that

> [p]rohibiting trial less than thirty days after the defendant appears in a position to begin preparing his defense more fully protects basic due process rights. . . .

Guidelines promulgated by the Second Circuit Judicial Council are also part of the history of the 1979 Amend-

---

Hearings, *supra* note 15, at 15 (testimony of Shirah Neiman, Deputy Chief of the Criminal Section, Southern District of New York United States Attorney's Office).

[18] 1979 Senate Hearings, *supra* note 15, at 51-53 (statement of Assistant U.S. Attorney General Phillip Heymann).

[19] S. Rep. No. 212, 96th Cong., 1st Sess. 1, 32 (1979) [hereinafter cited as Sen. Report 212]. The House concurred with the change. H.R. Rep. No. 390, 96th Cong., 1st Sess. 1 (1979).

ments to the Speedy Trial Act.[20] These Guidelines were discussed and applauded and indeed made a part of the record of the 1979 House and Senate Hearings and the Congressional Record.[21] However, the Petitioner misconstrues their meaning. For the better part of seven pages of its brief, Petitioner weaves an erroneous analysis of the Second Circuit Guidelines [Pet. Br. at 22, 24-30] and concludes that they "made clear" that a defendant is not automatically entitled to a new thirty-day period following the return of a superseding indictment. This is simply incorrect. The Second Circuit Guidelines *never* provided for any thirty-day preparation period to be mandatory or automatic, but merely contained a policy statement in the preamble recommending (not mandating) that a request for thirty days to prepare be liberally construed.[22] The

---

[20] Second Circuit Judicial Council Speedy Trial Act Coordinating Comm., *Guidelines Under the Speedy Trial Act (Jan. 16, 1979), reprinted in The Speedy Trial Act Amendments of 1979: Hearings on S. 961 and S. 1028 Before the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. 386-436 (1979) [hereinafter cited as Second Circuit Guidelines].

[21] 1979 Senate Hearings, *supra* note 15, at 386-436; 1979 House Hearings, *supra* note 15, at 306-353; 125 Cong. Rec. 15457 (June 19, 1979). At the same session a letter from Deputy Attorney General Benjamin Civiletti as well as the Comptroller General's report of May 2, 1979 entitled "The Speedy Trial Act—It's Impact on the Judicial System Still Unknown" were also made a part of the record. *Id.* at 15454-15455.

[22] The Second Circuit Guidelines provided in pertinent part: "[t]o insure the accomplishment of the goal of accommodating the interests of speedy disposition of the charges with reasonable requests by counsel for adjournments, whenever the time between arraignment and the scheduled trial date does not exceed thirty (30) days, the court shall (a) view a request for an adjournment of trial to a date beyond thirty (30) days, but within the sixty (60) day limit, liberally

allowance of a thirty-day defense preparation period was by no means mandatory as it currently is, absent consent of the defendant in writing, in section 3161(c)(2). It defies both logic and common sense to find that the Second Circuit Guidelines eliminated a right they never provided. Furthermore, the wording of section 3161(c)(2), as adopted, is not even remotely similar to the wording of the Second Circuit Guidelines.

Had Congress, after full consideration of the Second Circuit's guidelines, wished to fully adopt them and give the defense preparation period their meaning, it would have done so. Such intent cannot be imputed because the "short answer is that Congress did not write the statute that way." *United States* v. *Naftalin*, 441 U.S. 768 (1979). The Second Circuit Guidelines are simply not instructive in interpreting a mandatory preparation period they never imposed.

Petitioner also ignores that the policy statement contained in the preamble to the Second Circuit Guidelines presumably applied to the entire guidelines and was not intended to have selective application. Nowhere in the section regarding "subsequent charges," 1979 Senate Hearings, *supra* note 15, at 416-419, do the guidelines suggest that a request for thirty days from the filing of the subsequent charge should be considered any differently than a smiliar request on the original charge. The Second Circuit Guidelines just never made the thirty-day period

---

and (b) where such a request is denied, set forth its reasons for finding that the denial of the adjournment does not interfere with the defendant's or government's choice of counsel, or the parties' ability to prepare for trial without undue pressure." 1979 Senate Hearings, *supra* note 15, at 392-393.

mandatory or automatic at *any* time, while Congress did so in section 3161(c)(2).

Statutory Interpretation of 3161(c)(2)

It is against this backdrop that the scope of the defense preparation period guaranteed by subsection 3161(c)(2) must be interpreted. While, according to Petitioner, "the statute speaks clearly," the courts of appeals have given inconsistent and inconclusive interpretations to it. Petitioner's statement that the holding of the court below has been rejected by every other court of appeals that has considered the issue [Pet. Br. at 9 & n.6] is not accurate.[23]

---

[23] The Seventh Circuit's decision in *United States* v. *Feldman*, 761 F.2d 380, 389 (7th Cir. 1985), followed the decision of the Ninth Circuit in *United States* v. *Harris*, 724 F.2d 1452 (9th Cir. 1984), also finding an automatic application of 3161(c)(2) to a superseding indictment. However, *Feldman* may have been decided after Petitioner filed its brief. Also, while the Second Circuit in *United States* v. *Guzman*, 754 F.2d 482 (2d Cir.), *petition for cert. filed*, 53 U.S.L.W. 3759 (U.S. Apr. 9, 1985) (No. 84-1604), rejected an automatic reapplication of (c)(2) it found as to one of the counts a reasonable continuance should have been granted. Likewise the First Circuit in *United States* v. *Rush*, 738 F.2d 497 (1st Cir. 1984), *cert. denied*, 105 S. Ct. 1355 (1985), found that (c)(2) did not apply to the superseding indictment in that case and that (c)(2) applies only where (c)(1) also applies "unless [it would] deprive a defendant of adequate opportunity to prepare his defense." Thus, the issue was not completely resolved in *Rush*. *United States* v. *Horton*, 676 F.2d 1165 (7th Cir. 1982), *cert. denied*, 459 U.S. 1201 (1983), did not hold contrary to the Ninth Circuit, at least according to the Seventh Circuit when it rendered its decision in *Feldman*. The opinion in *United States* v. *Todisco*, 667 F.2d 255 (2d Cir. 1981), *cert. denied*, 455 U.S. 906 (1982), did not set forth how much time lapsed between the superseding indictment and trial nor did it turn on any specific analysis of 3161(c)(2). The court simply found that the district court did not abuse its discretion in refusing to grant a continuance. Petitioner inappropriately cited the Fifth Circuit ruling in *United States* v. *Williford*, No. 83-1376, *cert. denied*, 105 S.

Compare United States v. *Feldman*, 761 F.2d 380, 389 (7th Cir. 1985) ("it was a violation of the Speedy Trial Act to try [the defendants] less than thirty days after the return of the superseding indictment"); *United States* v. *Harris*, 724 F.2d 1452, 1455 (9th Cir. 1984) ("we read section 3161(c)(2) as guaranteeing that the defendant is not forced to trial less than thirty days from the date on which the defendant first appears *on the indictment on which the defendant ultimately goes to trial*" (emphasis in original)); *United States* v. *Wooten*, 688 F.2d 941, 951 (4th Cir. 1982) ("section 3161(c)(2) simply [] guarantee[s] to the criminal defendant the right to a delay of at least thirty days between arraignment and trial *in any circumstances*" (emphasis added)); *United States* v. *Arkus*, 675 F.2d 245, 248 (9th Cir. 1982) ("Congress intended that the thirty-day period apply also in cases of reindictment"), *with United States* v. *Gallo*, No. 83-3288 (6th Cir. May 29, 1985) ("the appropriate period for preparation by defendants following a superseding indictment is governed by the discretion of the district court, and not the statutory thirty-day requirement"); *United States* v. *Guzman*, 754 F.2d 482, 486 (2d Cir.), *petition for cert. filed*, 53 U.S.L.W. 3759 (U.S. Apr. 9, 1985) (No. 84-1604) ("[w]hen a superseding indictment makes only insubstantial changes in an original indictment, so that a defendant has not been deprived of adequate time to prepare a defense, we hold that, consistent with 18 U.S.C. §3161(c)(2), a district

Ct. 270 (1984), in view of the fact that the decision is not reported and not controlling authority. The Sixth Circuit has ruled contrary to the Ninth and Seventh Circuits, but based its decision on *Horton* and *Todisco*. *United States* v. *Gallo*, No. 83-3288 (6th Cir. May 29, 1985). However, the court in *Gallo* found the failure to grant a continuance to prepare following the addition of a RICO count in a superseding indictment was an abuse of discretion and reversed the conviction on that count. *Gallo*, slip op. at 32-33.

court may exercise its discretion in proceeding to trial without further delay"); *United States* v. *Rush*, 738 F.2d 497, 511 (1st Cir. 1984), *cert. denied*, 105 S. Ct. 1355 (1985) ("[w]e think it fully consistent with the congressional purpose of (c)(2) to apply the thirty-day limit on the same basis as the seventy-day limit in (c)(1), unless in a specific case this would deprive a defendant of adequate opportunity to prepare his defense"); *United States* v. *Horton*, 676 F.2d 1165, 1170 (7th Cir. 1982), *cert. denied*, 459 U.S. 1201 (1983) ("a fair implication of the statute is that reindictment for the same offense is permissible and that the time period begins to run with the first indictment").

Any ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity, *Liparota* v. *United States*, 105 S. Ct. 2084 (1985); *Rewis* v. *United States*, 401 U.S. 808, 812 (1971); *Bell* v. *United States*, 349 U.S. 81, 83 (1955), unless the legislature has clearly spoken to the contrary. *United States* v. *Gradwell*, 243 U.S. 476 (1917). Given the stated purpose of the thirty-day minimum to trial defense preparation period as set forth above and the requirement of lenity, the language "from the date the defendant first appears through counsel" can have no other reasonable meaning than the date the defendant *first appears through counsel on the indictment upon which the defendant ultimately goes to trial.*[24] While Petitioner now rejects such an interpretation, the government has previously urged an even more liberal construction f[illegible] 3161(c)(2) when, of course, it was to the government's advantage. *See United States* v. *Richmond*,

[24] The "prime danger" of the Speedy Trial Act as expressed by one of its drafters "is not dismissal but forced trial." 1979 Senate Hearings, *supra* note 15, at 73 (testimony of Professor Daniel Freed). In addition, the Senate expressed concern that it had not become "The Speedy Conviction Act." Sen. Report 212, *supra* note 19, at 26.

735 F.2d 208, 213 (6th Cir. 1984) (government argued that the 3161(c)(2) time period ran again after substitution of counsel). In fact, as Petitioner acknowledges, it was the *government* that urged the Ninth Circuit to hold that the thirty-day period of 3161(c)(2) ran again from the date of reindictment. *United States* v. *Arkus*, 675 F.2d 245, 246 (9th Cir. 1982).[25] *Arkus* formed the basis for the decision in *United States* v. *Harris*, 724 F.2d 1452 (9th Cir. 1984), which the Ninth Circuit found controlled the decision in Respondent's case [Pet. Cert. at 2a].

Contrary to Petitioner's assertions, both Respondent and the court of appeals gave the word "first" as it modifies appearance through counsel its "ordinary . . . common meaning" [Pet. Br. at 13 (citing *Perrin* v. *United States*, 444 U.S. 37, 42 (1979)]. However Petitioner should not "make 'a fortress out of a dictionary' [but] remember[] instead that 'statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.'" *United States* v. *Rabb*, 680 F.2d 294, 296 (3d Cir.), *cert. denied*, 459 U.S. 873 (1982) (quoting *Cabell* v. *Markham*, 148 F.2d 737, 739 (2d Cir.) (Hand, J.), *aff'd*, 326 U.S. 404 (1945)). If the words of 3161(c)(2) do not mean first appearance through counsel *on the indictment on which the defendant ultimately goes to trial*, then the statute fails to give the meaning clearly intended by its history which was to provide the defendant with a minimum mandatory trial preparation time. To say that a defendant may prepare for trial in a vacuum, that is, in the absence of precise charges, is to ignore the realities of representing an accused criminal defendant.

Practical Interpretation of 3161(c)(2)

Any change in a criminal charge can modify the theory of defense and require different preparation. A date

[25] Pet. Br. at 16 n.10.

change abrogates a planned alibi addressed to the originally charged date just as the deletion of an overt act vitiates a defense theory that the government failed to prove its case beyond a reasonable doubt. The vast majority of criminal cases do not have clear-cut single defenses but contain a variety of options demanding many judgment calls by counsel. A minor shift in the wording of an indictment causes a need to reflect, plan and possibly prepare an alternate defense. To compel a criminal defendant to reveal the nature of his/her defense in order to obtain a short time to absorb the effect of even a slightly changed indictment intrudes into the attorney-client relationship and the traditional work product privilege. It also impacts the Sixth Amendment guarantee of the effective assistance of counsel. Indeed, as Congress recognized, courts are often "loathe to grant 'ends of justice' continuances to permit adequate preparation time." Sen. Report 212, *supra* note 19, at 26. This rush to judgment encouraged by the outer time limits of the Speedy Trial Act was precisely the abuse Congress sought to avoid by enacting 3161(c)(2).

Respondent's case is a perfect example of the need for a subsequent defense preparation period upon the filing of a superseding indictment. The government viewed its superseding indictment as correcting a "typo" error and asserted that Rojas was not entitled to any additional preparation time. Accordingly the district court denied Rojas' request for a second defense preparation period. Petitioner argues that Rojas "has never suggested any reason why the superseding indictment . . . made more trial preparation time necessary" [Pet. Br. at 39] neglecting to acknowledge that Rojas requested a delay to obtain the "A" file which contained reports about the prior conviction [R.T.Tr. 21]. Petitioner also manages to ignore that the government must have viewed the incorrect date in the indictment as a problem significant enough to war-

rant taking precious grand jury time to re-present the case and obtain a second indictment. This step of a second presentation to the grand jury reflects either a change significant enough to also warrant a second defense preparation period or a serious waste of the grand jury. The government must have realized the greater potential for acquittal of the felony as originally charged. See note 14, *supra*.

Given the clear position adopted by the Ninth Circuit in *United States* v. *Arkus*, 675 F.2d 245 (9th Cir. 1982), there was no reason for Respondent to set forth reasons for assertion of an automatic and mandatory right under 3161(c)(2). *Id.* at 248. Second, to require a defendant to reveal the impact a change in the indictment has upon the defense is improper and places an unfair burden on the criminal defendant. A second indictment containing even a slight change requires the defendant to reconsider the steps taken to that point in the case. A narrow or legal defense may disappear with the changes, just as obviously occurred in Respondent's case. The charge of felony illegal entry in violation of 8 U.S.C. §1325 requires the government to prove a valid prior conviction for illegal entry. *United States* v. *Arambula-Alvarado*, 677 F.2d 51 (9th Cir. 1982). The prior conviction must meet constitutional standards. *United States* v. *Timmreck*, 441 U.S. 780 (1979); *Boykin* v. *Alabama*, 395 U.S. 238 (1969). Count one of the first indictment arguably charged an invalid prior conviction because it charged that a conviction occurred on December 17, 1981 when in fact there had been no conviction on that date. If the jury found that the prior conviction was not proven beyond a reasonable doubt, that is, with "proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it in the most important of his own affairs" [R.T.Tr. 314] it could have returned a lesser included offense ver-

dict of misdemeanor illegal entry. The impact of a felony versus misdemeanor conviction is significant—a six-month maximum sentence versus a two-year maximum sentence. 8 U.S.C. §1325. An obvious defense (and the likely reason for the government's superseding indictment) existed until the filing of the superseding indictment. Without the defense preparation period, Respondent had no time to rethink his position, negotiate a disposition or develop another strategy for trial.[26]

The appropriate interpretation of 3161(c)(2) requires automatic application of the defense preparation period of 3161(c)(2) upon the filing of a superseding indictment. Such an interpretation results in a rule which is simple to apply. It does not require that counsel violate any attorney-client or work product privilege or the Sixth Amendment right to counsel by revealing the theory or theories of defense. Further it does not require discretionary calls by the court which could result in continuous litigation and appeals. *E.g.*, *United States* v. *Guzman*, 754 F.2d 482 (2d Cir.), *petition for cert. filed*, 53 U.S.L.W. 3759 (U.S. Apr. 9, 1985) (No. 84-1604).

Petitioner's reliance on the failure of the statute to qualify the 3161(c)(2) thirty-day time period by including "post-superseding indictments" is nothing short of amazing. Indeed nowhere in the federal criminal code or Federal Rules of Criminal Procedure is the term "superseding indictment" even used. Specifically, neither of the other two statutory provisions contained in the Speedy Trial Act which Petitioner argues control this case,

---

[26] Certainly the loss of a defense is a "conceivable basis" to find the superseding indictment impeded Respondent's ability to go immediately to trial [Pet. Br. at 45].

3161(d)(1) and (h)(6), refer to superseding indictments.[27] In those two subsections, Congress was concerned with the dismissal of charges and a subsequent filing of the same or similar charges, not with the use of superseding indictments. Superseding indictments appear to be a creature of the prosecution created to correct sloppy drafting practices[28] and do not represent a significant percentage of the federal criminal trial load.[29] In fact, in view of the small percentage of cases to be controlled by resolution of the question presented by this case, one questions the vigor with which Petitioner insists the criminal defendant is not entitled to again assert the miniscule man-

---

[27] 18 U.S.C. § 3161(d)(1) and (h)(6) are reprinted in Petitioner's statutory appendix, Pet. Br. at 2a-4a.

[28] *Cf.* Misner, *District Court Compliance with the Speedy Trial Act of 1974: The Ninth Circuit Experience*, 1977 Ariz. St. L.J. n.140, *reprinted in* 1979 House Hearings, *supra* note 15, at 225 n.140.

[29] Information received from the Administrative Office of the United States Courts (Statistical Analysis and Reports Div., Admin. Office of the U.S. Courts; *1980-1984 Annual Report of the Director*) reveals that superseding indictments and informations resulting in a judge or jury trial for the past five years represent an approximate average of 1% of the total number of defendants indicted. The numbers are as follows:

Year Ending June 30,	1980	1981	1982	1983	1984
Total Number of Defendants Proceeding to Trial on Superseding Indictments or Felony Informations	394	348	437	561	502
Total Number of Defendants Indicted	25,612	27,367	29,384	31,742	33,781
% Superseding Indictments/Felony Informations to Total Defendants Indicted	2%	1%	1%	2%	1%

datory preparation time provided by Congress in enacting 3161(c)(2).

Petitioner's reliance on the language "appears with counsel" as having a meaning significantly distinct from language linking the start of the defense preparation period to the date of indictment [Pet. Br. at 14] ignores the apparent rationale behind the modification of the language of 3161(c)(2) from that initially drafted. *See supra* pp. 15-16; Sen. Report 212, *supra* note 19, at 32. A criminal defendant is not in a realistic position to prepare a defense or even meet the government's case until counsel has entered the picture and the indictment has been received. The slightest modification of a charge, whether or not it is "material" in the eyes of the government or the court, may substantially change the defense. *See supra* pp. 22-25. Thus, the appearance of counsel in the absence of the specific charges upon which the trial will proceed is meaningless because it does not place the defendant in a position to prepare his defense.[30]

18 U.S.C. §3161(d)(1), (h)(6) and (h)(8)(B)(iv) are not Applicable to this Case

Petitioner relies upon the statutory language of three additional sections of the Speedy Trial Act to support its conclusion that the defense preparation period guaranteed by 3161(c)(2) does not apply to superseding indictments. Those sections are: (1) 18 U.S.C. §3161(d)(1) which provides for restarting the speedy trial clock fol-

---

[30] A defendant could also decide to change counsel for a superseding indictment or in fact elect to proceed *pro se* and technically overcome Petitioner's objection. Such manipulation should not be encouraged by this Court where a simple recognition of the need for a minimum mandatory preparation period following the filing of each indictment would cure the problem.

lowing a successful *motion by the defendant* to dismiss an indictment or information (or dismissal of a complaint presumably by either party) where the government later files "the same offense or an offense based on the same conduct or arising from the same criminal episode"; (2) 18 U.S.C. §3161(h)(6) which provides for the exclusion of time between the government's dismissal of an indictment or information and its later filing of "the same offense, or any offense required to be joined with that offense"; and (3) 18 U.S.C. §3161(h)(8)(B)(iv) which sets forth as factors that the court shall consider in deciding to grant an "ends of justice" exclusion whether the failure to grant a continuance in a noncomplex case would deny the defendant reasonable time to obtain counsel, the defendant or the government continuity of counsel, or the defendant or the government reasonable trial preparation time.[31]

Petitioner's "bottom line" is that once a thirty-day period of time pursuant to 3161(c)(2) has run as to a defendant, regardless of when and for what reason a superseding indictment is filed, the defendant must rely upon an (h)(8)(B)(iv) discretionary continuance for trial preparation.[32] This position is grounded in Petitioner's

[31] The full text of these provisions is found in Pet. Br. at 1a-5a.

[32] Petitioner even suggests that should a superseding indictment contain wholly new charges, and not just a modification of earlier charges, the 3161(c)(2) time still would not run anew [Pet. Br. at 26]. This position would lead to more absurd results than Petitioner suggests would occur if the court of appeals decision is sustained. It would allow the government to file a single count indictment, provide mountainous discovery (so it could be said the defendant was aware) and then supersede, adding several counts of varying levels of intensity. The defendant would then be compelled to request a discretionary continuance which may or may not be granted by a federal court concerned about its calendar and moving the cases along. This is precisely the abuse 3161(c)(2) was enacted to prevent.

Further, there is no statutory or case authority to sustain the government's assertion that where completely new charges are filed in a superseding indictment, e.g., those that are not "the same offense or any offense required to be joined with that offense," the "clock" runs from the original indictment. *E.g.*, *United States* v. *Feldman*, 761 F.2d 380, 389 (7th Cir. 1985).

interpretation of the interaction of 3161(d)(1) and (h)(6) with 3161(c)(1). However, the language, history and purose of 3161(c)(2) mandate that the defense preparation period automatically applies to all superseding indictments regardless of whether the indictments overlap.

First, neither 3161(d)(1) nor (h)(6) apply to the facts of the case before this Court. Neither of these two sections address the speedy trial clock as it applies to a second indictment filed while the first indictment is pending and viable. The first indictment filed against Mr. Rojas was in existence at the time the second (superseding) indictment was filed and remained valid and viable until dismissed following the sentencing of Mr. Rojas on May 23, 1983 [DKT. 16]. On that basis neither the clock starting provisions of 3161(d)(1) (filing of a charge after a successful defense motion to dismiss) nor the excludable time provisions of 3161(h)(6) (filing a charge after dismissal by the government) control. *United States* v. *Feldman*, 761 F.2d 380 (7th Cir. 1985). The plain words of the statute given, as Petitioner would say, "their ordinary . . . common meaning, *Perrin* v. *United States*" [Pet. Br. at 13] compel the conclusion that neither 3161(d)(1) nor 3161(h)(6) controls in Respondent's case. It must be "generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion [of particular language]." *Russello* v. *United States*, 464 U.S. 16 (1983) (quoting

United States v. *Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)).

Second, where indictments overlap, a simple application of 3161(c)(1) and (c)(2) requires that the speedy trial clock start as to a second or subsequent indictment when it is filed or the defendant appears, whichever is later. Section 3161(c)(1) is clear and unambiguous:

> In *any* case in which a plea of not guilty is entered, the trial of a defendant charged in *an* information or indictment . . . shall commence within seventy days of the filing date (and making public) of the . . . indictment, or . . . date the defendant has appeared [in the court where the charge is pending, whichever is later]. . . . (Emphasis added.)

Application of this rule avoids Petitioner's primary concern that the seventy-day limit would be at risk should the defendant be given the minimum defense preparation period on a second or subsequent indictment.[33] It is also consistent with the plain statutory language of 3161(c)(2). It is a simple and bright line rule easily applied by the courts and avoids substantial litigation and the constant possibilities of retrial upon reversal. *See, e.g., United States* v. *Guzman*, 754 F.2d 482 (2d Cir.), *petition for cert. filed*, 53 U.S.L.W. 3759 (U.S. Apr. 9, 1985) (No. 84-1604) (conviction wherein fifteen-year penalty imposed

[33] This rule is also consistent with the Judicial Conference Guidelines relied upon by Petitioner [Pet. Br. at 16]. *See* Comm. on the Admin. of the Criminal Law of the Judicial Conference of the United States, *Guidelines to the Administration of the Speedy Trial Act of 1974, as amended* (rev. 1979 with amendments through Aug. 1981 and Apr. 1983) 14, and (rev. 1979 with amendments through Oct. 1984) 15-16. These guidelines conclude that the 3161(c)(2) period does not run again on a superseding indictment where the seventy-day limit is determined from the original indictment. This rule would restart the seventy-day time period.

reversed because reasonable continuance should have been granted); see also *supra* pp. 19-21. Finally, this rule avoids placing the burden upon the defendant to justify a continuance, a circumstance that Congress, by enacting 3161(c)(2), found did not adequately insure preparation time.

Third, balancing the public's and the defendant's interests in a speedy trial against the defendant's assertion of the miniscule statutorily mandated thirty-day preparation period cannot reasonably tip the scales away from the defendant. It is the government that chooses to file second and subsequent indictments and it is the government that chooses to file those second and subsequent indictments within thirty days of trial. It is the government then that should be held responsible for dissipating the pressure on its client's right to a speedy trial by its initial poor drafting and delay in filing superseding charges. The actions of the government should not be allowed to arbitrarily and completely control the time defense counsel has to prepare. Congress recognized that courts did not always provide adequate defense preparation time so it guaranteed a minimum mandatory time for defendants to prepare to meet the charges brought (not the charges that *could* be brought). Congress also recognized that because the government controls the "switch on the clock" the defendant shoulders "an unintended and unwarranted share of the speedy trial burden." Sen. Report 212, *supra* note 19, at 26. As a result, corrective procedures including 3161(c)(2) as well as flexibility in the automatic exclusions were enacted. To now give the government control over the switch on the defense preparation clock would violate the letter and spirit of the 1979 amendments.

There is potential for abuse in a rule which "restarts" the clock but no greater than the potential for abuse

resulting from the present exclusion provisions of the Act. *See infra* note 37. In addition, it cannot be presumed that a defendant would invoke the thirty-day preparation period in every instance. Likewise, if the government continually files a subsequent or superseding indictment upon the approach of the end of the Speedy Trial Act time to trial period, it will ultimately face a valid motion to dismiss under Fed. R. Crim. P. 48(b) for unnecessary delay in bringing a defendant to trial.[34] The slight potential for abuse cannot be said to outweigh the benefits of the clock starting upon the filing of each indictment. Petitioner acknowledges that a defendant has much to do upon the filing of an indictment, e.g., retain counsel, make a plea decision, evaluate defenses, locate witnesses, file motions and confer on trial strategy [Pet. Br. at 31]. As discussed *supra* pp. 22-25, all of these actions must be repeated upon the filing of a superseding indictment assuming that any change, even a "typo," is involved. The defendant may even legitimately need or want new counsel or elect to proceed *pro se* and certainly must evaluate the impact of any change on the defense and trial strategy. Additional motions may be warranted. If all of the defense preparation is complete and is unchanged by the superseding indictment the defendant will likely consent to an earlier trial. But to place the decision in the hands of the

[34] Rule 48(b) [Dismissal] By Court: "If there is unnecessary delay in . . . bringing a defendant to trial, the court may dismiss the indictment, information or complaint." The proposition that the government may continue to dismiss and refile assumes both bad faith and that there will be no problem with 3161(b) which requires *any* indictment to be filed within thirty days of arrest or service of summons, unless extended where there was no grand jury in session or by 3161(h)(8)(B)(iii). Such an assumption should not be made and the government should be aware that a tardy (re)filing could preclude filing at all. *See infra* p. 35 and note 40.

prosecution is unfair, unwise, and does not comport with the rudimentary demands of due process.

On the strength of two circuit court decisions Petitioner concludes that where there is *no gap* between dismissal and reindictment (which also is not the precise situation here because the first indictment remained viable until after sentencing) the seventy-day clock is computed by reference to the first or "original" indictment [Pet. Br. at 15-16 n.9].[35] *A fortiori* according to Petitioner, the thirty-day minimum defense preparation period cannot run anew because it could result in a violation of the seventy-day Speedy Trial Act time to trial requirement.[36]

The cases relied upon are not persuasive authority. In *United States* v. *Rush*, 738 F.2d 497, 511 (1st Cir. 1984), *cert. denied*, 105 S. Ct. 1355 (1985), the court recognized that the case was not governed by 3161(d)(1) or (h)(6) because the indictments overlapped but found it "fully consistent with the congressional purpose of (c)(2) to apply the thirty-day limit on the same basis as the seventy-day limit in (c)(1) *unless in a specific case this would deprive a defendant of adequate opportunity to prepare his defense*" (emphasis added). While the court found that 3161(c)(2) did not apply to the superseding indictment the decision rested upon the caveat underlined above. It must also be understood that the superseding indictment in

[35] Petitioner cites also to *United States* v. *Dennis*, 625 F.2d 782, 793 (8th Cir. 1980), as analogous support for this proposition. *Dennis* did not involve an interpretation of either 3161(d) or (h)(6) but merely recognized that there are differences in the Speedy Trial Act depending upon which party gains the dismissal.

[36] Petitioner cites as an example that a superseding indictment returned after the fortieth day, as occurred in this case, would compel a violation of the seventy-day limitation should the defendant refuse to consent in writing to a trial in less than thirty days.

Rush was returned some 671 days[37] before trial began with the formal arraignment delayed at the appellants' request to save the effort and expense of superfluous pretrial appearances by counsel. *Id.* at 511. Thus, the defendants received far more than the thirty-day minimum defense preparation time after filing of the superseding indictment.

Likewise the analysis in *United States* v. *Horton*, 676 F.2d 1165 (7th Cir. 1982), *cert. denied*, 459 U.S. 1201 (1983), is inapposite because there the government dismissed the original indictment and thus 3161(h)(6) applied. The *Horton* court recognized that overlapping indictments were not controlled by 3161(d)(1) or 3161(h)(6) but found that "a fair implication of the statute" allowed reindictment for the same offense with the clock running from the first indictment. *Id.* at 1170. The decision was based upon a district court decision that did not even address the issue and which was decided before 3161(c)(2) was enacted.[38] The Seventh Circuit has itself

[37] The "seventy-day" indictment or arraignment to trial mandate may be an illusion. *See, e.g., United States* v. *Pringle*, 751 F.2d 419 (1st Cir. 1984) (463 calendar days to trial with only 62 nonexcludable days); *United States* v. *Henderson*, 746 F.2d 619 (9th Cir. 1984), *petition for cert. filed*, 53 U.S.L.W. 3826 (U.S. May 6, 1985) (No. 84-1744) (789 calendar days to trial with only 66 nonexcudable days); *United States* v. *Campbell*, 706 F.2d 1138 (11th Cir. 1983) (265 calendar days to trial with only 37 nonexcludable days); *United States* v. *Clifford*, 664 F.2d 1090 (8th Cir. 1981) (211 calendar days to trial with only 62 nonexcludable days).

[38] The *Horton* court cited *United States* v. *Sebastian*, 428 F. Supp. 967, 973 (W.D.N.Y.), *aff'd on other grounds*, 562 F.2d 211 (2d Cir. 1977), as authority for its ruling. However, *Sebastian* interpreted 3161(h)(6) as permitting reindictment but did not involve or resolve the question of overlapping indictments. Furthermore, *Sebastian* was decided in 1977, two years before 3161(c)(2) was enacted. *Sebastian* did recognize a potential problem posed by 3161(b) in the reindictment of a case but found the section not applicable because the case had been indicted before the effective date of the time limits.

rejected the interpretation given *Horton* in Petitioner's brief. *United States* v. *Feldman*, 761 F.2d 380 (7th Cir. 1985). In *Feldman* the court noted that 3161(h)(6) explicitly requires the government to move for and obtain the dismissal and stated "[w]e are reluctant to expand a statutory scheme's exception, section 3161(h)(6), to include an implied dismissal by the government." *Id.* at 389.

3161(c)(2) Also Applies to a Superseding Indictment Filed After the Original Indictment has been Dismissed

Both subsections 3161(d)(1) and 3161(h)(6) have been in the Speedy Trial Act since it became law in 1975.[39] Subsection 3161(d)(1) lifts the bar to refiling of charges after a successful defense motion to dismiss. Were it otherwise, 3161(b) could and, read literally, does preclude the later (after thirty days of arrest) filing of an indictment.[40] *See United States* v. *Pollock*, 726 F.2d 1456 (9th Cir. 1984). *But see United States* v. *Heldt*, 745 F.2d 1275 (9th Cir.

[39] Provisions covering the same area were in fact contained in various Speedy Trial Act proposals dating back to 1971. *See* S. 754 (1974), H.R. 7873 (1973), H.R. 207 (1973), H.R. 658 (1973), H.R. 687 (1973), H.R. 773 (1973), H.R. 4807 (1973), *reprinted in Speedy Trial Act of 1974: Hearings Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 93d Cong., 2d Sess. (1974); S. 895 (1971), H.R. 7107 (1971), S. 754 (1972 and 1974), H.R. 17409 (1974), *reprinted in* Partridge, *Legislative History of Title I of the Speedy Trial Act of 1974* 279-374 (Federal Judicial Center 1980).

[40] 18 U.S.C. § 3161(b) requires that "*any* indictment . . . be filed within thirty days . . . of arrest [] or [service] with a summons in connection with such charges . . ." (emphasis added).

1948); *United States* v. *McCown*, 711 F.2d 1441 (9th Cir. 1983); *United States* v. *Wilks*, 629 F.2d 669 (10th Cir. 1980). However, it would be logically inconsistent to deny the government the opportunity to file a subsequent indictment solely because the defendant waited thirty days to bring a successful motion to dismiss. On that basis it is understandable why Congress specifically included the clock restarting provisions in 3161(d)(1).

Subsection 3161(h)(6) on the other hand is not a clock starting provision like 3161(d)(1) but an excludable time provision. It was evidently designed to prohibit the government from filing, dismissing and refiling simply to gain more Speedy Trial Act time.[41]

Both of these subsections remained intact during the 1979 amendments. In fact, both subsections were ignored and not discussed by either the House or Senate in 1979. The defense preparation period of 3161(c)(2) was added without regard to the previously existing sections of the Act. Section 3161(h)(6) was designed to restrict government conduct and was not intended to restrict the mandatory defense preparation period contained in 3161(c)(2). This is so particularly in view of the fact that the (h)(6) switch is controlled by the government. To hold otherwise would emasculate the intent of 3161(c)(2) to provide for a thirty-day delay of trial *in any circumstances*. *Cf. United States* v. *Wooten*, 688 F.2d 941 (4th Cir. 1982).

---

[41] *See* Frase, *The Speedy Trial Act of 1974*, 43 U. Chi. L. Rev. 667, 669 (1976) ("Since the filing of superseding charges is entirely within the control of the government, such a rule makes sense: the government should not be permitted to obtain additional time simply by filing slightly different charges against the same defendant for the same criminal episode."); *United States* v. *Hencye*, 505 F. Supp. 968, 971 (N.D. Fla. 1981).

Petitioner argues that a defendant's trial preparation time in these nonoverlapping indictment situations comes from 3161(h)(8)(B)(iv). However, an equally reasonable reading of the combined effect of 3161(c)(2) and (h)(6) in such situations is to require the government, not the defendant, to justify an "ends of justice" continuance under 3161(h)(8) to avoid a violation of the seventy-day requirement. This reading gives full force and effect to the purpose of both provisions and places the burden where it belongs—on the party who controls the filing of indictments. There is no reason why it would be unfair to place the burden of obtaining excludable time on the government. Certainly if good cause exists the government can justify the delayed filing of a superseding indictment.[42]

If the government uses a superseding indictment to add defendants, a "reasonable period" of time will be automatically excluded under 3161(h)(7) (joinder of defendants). If the government intends to proceed as to the original defendants first, a superseding indictment is not necessary and the "new" defendants (whether newly discovered or not) can be charged in a separate indictment. If a superseding indictment merely "conforms the indictment more precisely or in greater detail to the contents of the bill of particulars . . . [or is reflective of] pre-trial

---

[42] For Petitioner to admit that the government uses the grand jury to correct typographical errors, eliminate charges or delete defendants is astounding. Certainly grand juries have more to do than pass judgment on the same case twice solely because indictments cannot be proofread and unnecessary charges or co-defendants dismissed out before trial. The government can seek an extension of the thirty-day arrest to indictment time period should it need more time to return a solid, well drafted indictment. 18 U.S.C. § 3161(h)(8)(B)(iii). Additionally, how quickly the government forgets it makes the decision of when and who to indict and for what offenses.

motions," [Pet. Br. at 33] the government should be able to supersede with more than thirty nonexcludable days left before trial, and if not, obtain a 3161(h)(8) exclusion in order to so file.

Rather than viewing the reconciliation of 3161(h)(6) and 3161(c)(2) as another burden to be carried by the defendant because "a new indictment does not always require significant additional preparation . . . strategy may be totally unaltered . . . the defendant [received] sufficient informal notice" [Pet. Br. at 33], it should appropriately be placed with the party creating the problem—the government. Additionally, had Congress intended 3161(h)(8)(B)(iv) to supplant (c)(2) as the defense preparation period it would not have needed to enact both subsections. Both 3161(h)(8)(B)(iv) and (c)(2) were products of the 1979 amendments designed to remedy separate problems: "[w]hy would the drafters add a second provision to protect a right already explicitly provided?" *Cuyler* v. *Adams*, 449 U.S. 433, 446 (1981). As this Court aptly noted, common sense requires that a second paragraph be construed as securing something more.[43] *Id.* at 446.

---

[43] The Senate Judiciary Committee also recognized the distinction between the 3161(c)(2) right and the 3161(h)(8) "ends of justice" continuance provision. It suggested that the courts scrutinize counsel's "good faith" efforts to prepare within the time set for trial "[i]f, for example, counsel for the defendant moves for an 'ends of justice' continuance under section 3161(h)(8) to allow him or her *additional time* to prepare for trial . . ." (emphasis added). Sen. Report 212, *supra* note 19, at 32. This language reflects the distinction between the trial preparation time provided in 3161(c)(2) and the "ends of justice" preparation time provided for in 3161(h)(8). *See also* 1979 House Hearings, *supra* note 15, at 12 (testimony of Robert Fiske recognizing that two provisions in the amendments provide for preparation time and continuity of counsel).

A second reasonable interpretation of the combined effect of 3161(c)(2) and (h)(6) is to find that the assertion of the (c)(2) right where a superseding indictment is filed within thirty days of the seventy-day time limit automatically invokes an (h)(8)(B)(iv) exclusion and allows the court to reschedule a trial date past what would have been the original seventy-day limit. This interpretation also gives full force and effect to the purpose of both provisions. As reflected earlier in note 37, the seventy-day limit is often an illusion in view of the many exclusions available in the Speedy Trial Act. Petitioner's concern that the (c)(2) minimum defense preparation period will cause a violation of the seventy-day limit of (c)(1) does not recognize the realities of the Speedy Trial Act.

Given that there are interpretations of 3161(h)(6) consistent with invoking the mandatory provisions of 3161(c)(2), this Court should "err" on the side of a statutory construction supporting fundamental constitutional rights. *Cf. Time, Inc.*, v. *Regan*, 468 U.S. ____, 104 S. Ct. 3262, 3292 (1984) (Stevens, J., concurring in part and dissenting in part). Congress granted the defendant a minimum mandatory preparation period (3161(c)(2)) as well as the ability to seek a longer preparation time (3161(h)(8)(B)(iv)) where necessary. The minimum mandatory preparation time was designed to start when the defendant was in a position to defend himself. Sen. Report 212, *supra* note 19, at 32. To construe the statute to take away the minimum preparation time upon the unilateral action of the government in filing a subsequent indictment is not consistent with the Sixth Amendment.

Adoption of Petitioner's position that the defendant in a federal criminal case can be compelled to trial in less than thirty days of the date the government chooses to file a superseding indictment will completely destroy the pur-

pose of the defense preparation period mandated by Congress in 18 U.S.C. §3161(c)(2). Petitioner's position subjects the rights of the criminal defendant to the will and whims of the prosecution. It is contrary to the intent and language of the statute and poses severe practical burdens on the criminal defendant which should not be countenanced by this Court.

II.

FORCING A DEFENDANT TO GO TO TRIAL IN VIOLATION OF 18 U.S.C. §3161(c)(2) CAN NEVER BE DEEMED HARMLESS ERROR.

Under the guise of the harmless error doctrine, Petitioner reargues its position that 18 U.S.C. §3161(c)(2) does not and should not allow a defendant to assert the minimum mandatory thirty-day preparation period following the filing of a superseding indictment. According to Petitioner this is so, particularly in Respondent's case, because one thirty-day period has already been granted and used and there can be no conceivable basis to claim that the superseding indictment impeded trial preparation.

Again, Petitioner completely ignores the language, purpose and history of 18 U.S.C. §3161(c)(2). *See supra* pp. 14-27. In enacting the Speedy Trial Act, Congress created a rigid statutory scheme and, as Petitioner writes, constructed "a window of time during which a case must be tried" [Pet. Br. at 8]. Petitioner now asks this Court to ignore the specific mandate of the Speedy Trial Act and find a violation of the Act to constitute harmless error. To do so would write 3161(c)(2) out of the Speedy Trial Act and render it a nullity.[44]

---

[44] Petitioner suggests [Pet. Br. at 42] that none of the defense attorneys who testified at the 1979 House and Senate hearings suggested that harmless error principles would not apply. It is equally notable that no one suggested that harmless error principles would apply. The issue was simply never discussed. The Second Circuit Guidelines do not support a harmless error test because they did not create or even suggest a bright line rule like section 3161(c)(2).

The harmless error rule is found in both Rule 52 of the Federal Rules of Criminal Procedure and 28 U.S.C. §2111. This Court has construed the rule to apply to constitutional errors, *Chapman* v. *California*, 386 U.S. 18 (1967); *United States* v. *Hasting*, 461 U.S. 499 (1983), as well as non-constitutional errors. *See Hamling* v. *United States*, 418 U.S. 87, 108 (1974) and cases cited therein; *see also Kotteakos* v. *United States*, 328 U.S. 750 (1946). However, application of the harmless error rule is not carved in stone for this Court has recognized that there are exceptions to the rule and certain errors that may involve rights so basic to a fair trial that their violation can never be harmless. *United States* v. *Hasting*, 461 U.S. at 508 n.6 (citing *Payne* v. *Arkansas*, 356 U.S. 560 (1958) (coerced confession); *Gideon* v. *Wainwright*, 372 U.S. 335 (1963) (right to counsel); and *Tumey* v. *Ohio*, 273 U.S. 510 (1927) (impartial judge)); *Jackson* v. *Virginia*, 443 U.S. 307, 320 n.14 (1979) ("[o]ur cases have indicated that failure to instruct a jury on the necessity of proof of guilt beyond a reasonable doubt can never be harmless error"). There may also be some errors that call for automatic reversal because the impact of the error is impossible to determine. *E.g.*, *Connecticut* v. *Johnson*, 460 U.S. 73 (1983) (plurality opinion) (because the impact of a jury instruction given in violation of *Sandstrom* v. *Montana*, 442 U.S. 510 (1979), could not be determined the error could not be deemed harmless); *Carpenters* v. *United States*, 330 U.S. 395, 408 (1947) (jury instruction that misstated the law could not be harmless error even

though there was evidence of guilt because "[t]here [was] no way of knowing [] whether the jury's verdict was based on facts within the condemned instructions. . . . A failure to charge correctly is not harmless, since the verdict might have resulted from the incorrect instruction."); *Bollenbach* v. *United States*, 326 U.S. 607, 617 (1946) (erroneous instruction not harmless even in view of abundant evidence since "[i]t would indeed be a long jump at guessing to be confident that the jury did not rely on the erroneous 'presumption' given them as a guide. . . . [t]he question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials in the federal courts."); R. Traynor, *The Riddle of Harmless Error* 57, 64-73 (1970).

Likewise, violations of standards prescribed by Congress, regardless of how clear the evidence in a case, fall within this category of error subject to automatic reversal. In *Carpenters* v. *United States*, this Court clarified the deference which rules of Congress are to be accorded holding

> [o]ur only point is this: Congress in §6 [of the Norris-LaGuardia Act] has specified the standards by which liability . . . is to be determined. No matter how clear the evidence, [the defendants] are entitled to have the jury instructed in accordance with the standards which Congress has prescribed. . . . It could not be said that the failure [to instruct properly] was harmless error.

Id. at 410. Implementation of the strict rule of 3161(c)(2) must be accorded this same deference. It is a rigid standard prescribed by Congress and a matter directly affecting the judicial process and the administration of justice. The harm that results from its violation must be presumed for it cannot be measured or evaluated. A violation

of 3161(c)(2) resulting from forcing the defendant to go to trial on a superseding indictment in less than the minimum preparation period must therefore be subject to automatic reversal.

The selection of thirty days as a minimum defense preparation period appears from all accounts to be an arbitrary time period suggested by both the Judicial Conference and the Department of Justice.[45] *See supra* note 15. Congress adopted the recommended thirty-day requirement and gave the defendant the option to proceed to trial in less than thirty days by consenting to such in writing. Implicitly, Congress found that forcing a defendant to trial in less than thirty days would be harmful to the defendant and prejudicial error. It adopted 3161(c)(2) to prevent the Speedy Trial Act from becoming the "Speedy Conviction Act," Sen. Report 212, *supra* note 19, at 26, and to express the policy that a defendant must be accorded some minimal preparation time even in the simplest case. *See supra* text at note 18. The mandatory defense preparation period was inserted into the Act due to a serious concern that defendants would be rushed to trial because of countervailing Speedy Trial Act demands. *Supra* note 24; 1979 Senate Hearings, *supra* note 15, at 93, 115. Thus, 3161(c)(2) was enacted in order to guarantee defendants a minimum of thirty days to prepare for trial.

Congress also provided for a discretionary "ends of justice" continuance pursuant to 3161(h)(8)(B)(iv) which

---

[45] There has been a more recent suggestion that thirty days is too short. *Implementation of the Speedy Trial Act, Hearings Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 97th Cong., 1st Sess. 64 (1981) (statement of Robert Weinberg, Williams and Conley, recommending a 120-day minimum defense preparation period).

the court can use to grant relief from too speedy a trial in order for counsel to be prepared. Presumably, a denial of a discretionary continuance pursuant to 3161(h)(8)(B)(iv) would be subject to Petitioner's harmless error analysis unless the Sixth Amendment was violated. *Cf. United States* v. *Burton*, 584 F.2d 485, 491 n.19 (D.C. Cir. 1978), *cert. denied*, 439 U.S. 1069 (1979) (harmless error tests do not apply to Sixth Amendment violation based on denial of continuance where it would have been fair and reasonable to enable the defendant to retain or substitute counsel). However, to allow a violation of a specific and non-discretionary thirty-day provision to go uncorrected by virtue of finding the violation harmless error would be equivalent to repealing the law itself. Quite obviously, this Court interprets the law and is not a legislative body. *Marbury* v. *Madison*, 1 Cranch 137 (1803); *Barker* v. *Wingo*, 407 U.S. 514, 523 (1972).

If trial on day twenty-nine instead of day thirty-one can be deemed harmless error, 3161(c)(2) has no meaning. Either Congress created an inflexible rule or it did not. Indeed, in *Barker* v. *Wingo*, a decision rendered prior to the Speedy Trial Act, the Sixth Amendment's Speedy Trial Clause was given an extremely flexible interpretation. In that case, this Court refused to create a specified time limit for trials finding that to do so would require the Court to engage in legislative activity. It was in response to this decision and to the lack of guidance supplied by Fed. R. Crim. P. 50(b)[46] that Congress enacted the inflexible rules of the Speedy Trial Act.[47]

[46] Then existing Fed. R. Crim. P. 50(b) provided in pertinent part:

> To minimize undue delay and to further the prompt disposition of criminal cases each district court shall . . . prepare a plan for the prompt disposition of criminal cases which shall include rules relating to time limits within which procedures prior to trial, the trial itself . . . must take place. . . .

Certainly the words in 3161(c)(2) that "unless the defendant consents in writing to the contrary, the trial *shall not commence less than thirty days* . . ." (emphasis added) are inflexible and create a bright line standard. The statute does not say "if it does not prejudice the defendant, trial shall not commence" but instead commands that unless the defendant acts to waive the minimum mandatory defense preparation period of thirty days, "*trial shall not commence less than thirty days*. . . ."

In view of the explicit language of 3161(c)(2) there was no reason for Congress to expressly provide a remedy for its violation. Courts must follow its mandate or face retrial of the cause. There can be no other remedy.[48] Remedies for violations of the outer time limits (thirty days plus exclusions from arrest to indictment pursuant to 3161(b) and seventy days plus exclusions from indictment to trial pursuant to 3161(c)) were required because the courts would not be in complete control of those limits. The government is in primary control of the outer time

[47] *See* Legislative History, Pub. L. No. 93-619, 1974 U.S. Code Cong. & Ad. News 7401, 7404-05.

[48] The Ninth Circuit recognized that Congress did not amend 18 U.S.C. § 3162(a)(2) to conform to the addition of 3161(c)(2) and found that "it is an open question" whether the sanction of dismissal set forth in 3162(a)(2) applies to violations of 3161(c)(2). *United States* v. *Daly*, 716 F.2d 1499, 1506 (9th Cir. 1983). However, because the defendant in *Daly* did not move for dismissal as required by 3162(a)(2) the court did not reach that question. Instead, it found that the violation of 3161(c)(2) was equivalent to forcing the defendant to trial without adequate preparation time and remanded for a new trial. *Id.* at 1506.

limits by virtue of its management of the time of the grand jury as well as its decision making authority over the number and magnitude of the cases presented. If the government cannot be prepared to try its case within the statutorily mandated time provisions of the Speedy Trial Act then Congress requires that sanctions be imposed. Thus, Congress has given specific guidance to the courts as to what to do in the event that the parties do not comply with the outer time limits of the Act. 18 U.S.C. §3162. These sanction provisions are necessary for the court to punish actions outside of its immediate control. However, the scheduling of a trial date beyond a minimum time period is completely within the control of the court. There is no reason for a court to violate the rule and therefore no reason for Congress to have specified a sanction. For those courts that choose to ignore the mandate of Congress to provide a thirty-day minimum defense preparation period, there can be no remedy other than retrial with the appropriate preparation period provided. Petitioner's statement that there is no evidence that Congress intended an otherwise valid conviction to be overturned simply because its rules were violated [Pet. Br. at 41] is misleading. There is no evidence that Congress expected its rigid rule would be violated because there was no reason to believe a matter completely within the control of the court would be ignored by the court. Congress is entitled to expect its standards will be followed. *Carpenters* v. *United States*, 330 U.S. at 410. The rule Congress created in 3161(c)(2) does not require the exercise of any discretion.

In providing for the strict requirement that a "trial *shall not commence*" Congress essentially created an exception to the concept of harmless error. Congress did not need to specifically state an exemption from that

concept because by making a rigid date requirement it created one. Rarely if ever could a defendant show specific prejudice resulting directly from the court starting trial one day in advance of the expiration of the minimum defense preparation period. However, had Congress intended the courts to make discretionary calls with regard to the defense preparation period it could have adopted the language of the Second Circuit Guidelines or provided that 3161(h)(8)(B)(iv) be the sole basis for providing time to prepare for trial. It did not. *See supra* pp. 16-18, 38. This Court cannot now adopt a new flexibility that the Congress did not. A case by case analysis of the "possible injury" [Pet. Br. at 45] or harm caused by forcing a defendant to go to trial in less than the thirty-day minimum defense preparation period cannot be permitted.[49] To do so will encourage violations of the rigid rule created by Congress in 3161(c)(2) and will subrogate the plain meaning of the rule and the intent of Congress to the calendar of the district courts and prosecutors.

There can be no other reasonable result than the one adopted by the court of appeals and that is to reverse any conviction obtained after a defendant has been forced to trial in violation of 3161(c)(2) and to allow for a new trial. *Per se* application renders 3161(c)(2) clear and meaningful. That clarity and meaning will be destroyed by upholding, under the guise of harmless error, a district court's decision to force a defendant to trial in violation of the minimum mandatory defense preparation period.

---

[49] Respondent does not in any manner concede, or agree with Petitioner, that the superseding indictment did not increase his burden, open up new lines of defenses, or affect his ability to be ready for trial. To the contrary, Respondent has set forth the "possible injury" caused by the violation of 3161(c)(2). *Supra* pp. 23-25.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submittted,

JUDY CLARKE
Federal Defenders of San Diego, Inc.
101 West Broadway, Suite 440
(619) 234-8467
San Diego, California 92101-8297
Counsel for Respondent
Appointed by this Court

APPENDIX

APPENDIX

United States District Court

FOR THE
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA

v.

FERNANDO ROJAS-CONTRERAS
A23 103 064

COMPLAINT for VIOLATION of
U.S.C. Title 8 Section 1325 (Felony)
U.S.C. Title 8 Section 1326 (Felony)

FILED FEB 14, 1983
CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

BEFORE: J. EDWARD HARRIS
SAN DIEGO, CALIFORNIA

The undersigned complainant being duly sworn states:

COUNT ONE

That on or about May 15, 1982, defendant Fernando ROJAS-Contreras was arrested and deported from the United States to Mexico through the Port of Calexico, California, in pursuance of law, and thereafter, on or about February 13, 1983, defendant was found in San Diego County, within the Southern District of California, the Attorney General of the United

States not theretofore having consented to any reapplication by the defendant for admission into the United States and after the defendant has willfully and unlawfully returned and remained in the United States, in violation of Title 8, United States Code, Section 1326.

COUNT TWO

That on or about February 13, 1983, within the Southern District of California, defendant Fernando ROJAS-Contreras, an alien, did knowingly and willfully enter the United States at a time and place other than as designated by Immigration officers and elude examination or inspection by Immigration officers, a felony, in violation of Title 8, United States Code, Section 1325, in that the defendant was previously convicted for violation of Title 8, United States Code, Section 1325, on March 1, 1981.

And the complainant states that this complaint is based on statements of the apprehending officers that the defendant was found near Chula Vista, California, and upon inquiry was unable to establish United States citizenship, has no identification on his person, was unable to speak English, and admitted to apprehending officers that he was a citizen of Mexico and had no right to be in or enter the United States.

JAMES P. WAGONER
Border Patrol Agent

February 14, 1983

FOR ARGUMENT

No. 84-1023

Supreme Court, U.S.
FILED
OCT 2 1985
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1985

UNITED STATES OF AMERICA, PETITIONER

v.

FERNANDO ROJAS-CONTRERAS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

CHARLES FRIED
Acting Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

BEST AVAILABLE COPY

TABLE OF AUTHORITIES

Page

Cases:

Albernaz v. *United States*, 450 U.S. 333 2

Avery v. *Alabama*, 308 U.S. 444 8

Chambers v. *Maroney*, 399 U.S. 42 8

Jackson v. *Virginia*, 443 U.S. 307 8

Liparota v. *United States*, No. 84-1508 (May 13, 1985) 2

Rogers v. *United States*, 422 U.S. 35 7

Rosenberg v. *United States*, 360 U.S. 367 7

United States v. *Adu*, No. 84-1106 (9th Cir. Sept. 16, 1985) 6, 7

United States v. *Albertini*, No. 83-1624 (June 24, 1985) 2

United States v. *Cronic*, No. 82-660 (May 14, 1984) 8

United States v. *Darby*, 744 F.2d 1508, cert. denied, Nos. 84-1261 and 84-1260 (May 13, 1985) 2

United States v. *Donovan*, 429 U.S. 413 7

United States v. *Feldman*, 761 F.2d 380 4

United States v. *Gallo*, 763 F.2d 1504 4

United States v. *Guzman*, 754 F.2d 482, petition for cert. pending, No. 84-1604 4

United States v. *Hawkins*, No. 83-3704 (11th Cir. July 22, 1985) 7

Page

Cases—Continued:

United States v. *Horton*, 676 F.2d 1165, cert. denied, 459 U.S. 1201 4

United States v. *Richmond*, 735 F.2d 208 5

Statutes and rule:

Jencks Act, 18 U.S.C. 3500 7

Omnibus Crime Control and Safe Streets Act of 1968, Tit. III, 18 U.S.C. 2518 7

Speedy Trial Act, 18 U.S.C. 3161 *et seq.* :

18 U.S.C. 3161(c)(1) 3
18 U.S.C. 3161(c)(2) 1, 2, 3, 4, 5, 7, 8
18 U.S.C. 3161(d)(1) 2, 5
18 U.S.C. 3161(d)(2) 5
18 U.S.C. 3161(e) 5
18 U.S.C. 3161(h) 5
18 U.S.C. 3161(h)(6) 4
18 U.S.C. 3161(h)(8) 5, 7
18 U.S.C. 3161(h)(8)(A) 5
18 U.S.C. 3161(h)(8)(B)(iv) 4, 5, 6
18 U.S.C. 3161(i) 5

Fed. R. Crim. P. 43 7

Miscellaneous:

Judicial Council Speedy Trial Act Coordinating Comm., *Guidelines Under the Speedy Trial Act (Jan. 16, 1979), reprinted in the Speedy Trial Act Amendments of 1979: Hearings on S. 961 and S. 1028 Before the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. (1979) 3

In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 84-1023

UNITED STATES OF AMERICA, PETITIONER

v.

FERNANDO ROJAS-CONTRERAS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

We demonstrated in our opening brief that the language, legislative history, and purposes of the Speedy Trial Act all compel the conclusion that a new 30-day defense preparation period does not begin to run when a superseding indictment is returned. Respondent has pointed to nothing that supports a contrary reading of the Act.

1. The Speedy Trial Act in terms provides that the 30-day preparation period runs "from the date on which the defendant *first* appears through counsel or expressly waives counsel." 18 U.S.C. 3161(c)(2) (emphasis added). Respondent simply disregards this language, and reads the statute as though the "date" described is "the date defendant *first appears through counsel on the indictment upon which the defendant ultimately goes to trial.*" Resp. Br. 21, 22 (emphasis in original). But nothing in Section 3161(c)(2) supports such a construction; to the contrary, "when

employing the term 'first,' Congress presumably did not have *subsequent* appearances in mind." *United States* v. *Darby,* 744 F.2d 1508, 1520 (11th Cir. 1984), cert. denied, Nos. 84-1261 and 84-1260 (May 13, 1985) (emphasis in original).[1] In essence, respondent's brief is a lengthy request that the Court rewrite the Act.[2]

2. Given the clarity of Section 3161(c)(2), respondent can prevail only if the legislative history contains "the most extraordinary showing of contrary intentions." *United States* v. *Albertini,* No. 83-1624 (June 24, 1985), slip op. 4. Yet respondent has failed to offer a single item of legislative history that supports his view of the relationship between superseding indictments and Section 3161(c)(2).

Instead, respondent's discussion of the legislative history is in large part negative: he argues (Br. 16-18) that the Second Circuit guidelines, from which Section 3161(c)(2) was derived, are not apposite to the question here. As we explained in our opening brief (at 24-26 & n.18), however,

---

[1]Respondent also makes no attempt to respond to our argument (U.S. Br. 14-15) that Section 3161(d)(1) sheds light on Congress's intentions regarding Section 3161(c)(2). Section 3161(d)(1) provides that the defendant is afforded a new preparation period when the indictment is dismissed on the defendant's motion and a new indictment subsequently is returned. Congress's contrasting omission of a new 30-day period in cases involving superseding indictments suggests that new automatic preparation periods are not required by the Act in such cases.

[2]Respondent suggests that his construction is required by the rule of lenity (Br. 21). But the rule of lenity provides only that ambiguous statutes should be read narrowly to "ensure[] that criminal statutes will provide fair warning concerning conduct rendered illegal" (*Liparota* v. *United States,* No. 84-5108 (May 13, 1985), slip op. 8); it does not require the courts to apply every procedural rule in a manner that benefits the defendant. In any event, the rule of lenity "only serves as an aid for resolving an ambiguity; it is not to be used to beget one." *Albernaz* v. *United States,* 450 U.S. 333, 342 (1981). There is no ambiguity in Section 3161(c)(2).

the guidelines explicitly provided that district courts were free "to adhere to the originally scheduled trial date" after the return of a superseding indictment if "neither party needs any additional time to prepare for trial on the superseding indictment." Judicial Council Speedy Trial Act Coordinating Comm., *Guidelines Under the Speedy Trial Act (Jan. 16, 1979), reprinted in the Speedy Trial Act Amendments of 1979: Hearings on S. 961 and S. 1028 Before the Senate Comm. on the Judiciary,* 96th Cong., 1st Sess. 420 (1979) ["*1979 Senate Hearings*"]. See *id.* at 418-419.

It is true, of course, that the Second Circuit guidelines did not make a 30-day preparation period mandatory even after the first indictment. But such a period was presumptively to be made available at that time upon a request by the defense or prosecution (*1979 Senate Hearings* 392-393); in contrast, a new 30-day period was not to be granted as a matter of course after the return of a superseding indictment. Because Congress urged the courts to consult the guidelines when construing the Act (as we explain in our opening brief at 29-30), the structure of the guidelines is persuasive evidence that Section 3161(c)(2) was not intended to provide for an automatic 30-day delay after the return of a new indictment.

3. Respondent is untroubled by the anomaly that follows from his construction of the Act, namely, that the application of Section 3161(c)(2) to superseding indictments, in combination with the 70-day indictment-to-trial limit imposed by Section 3161(c)(1), may lead to cases in which no trial date will be permissible (see U.S. Br. 17-18). Respondent purports to solve this problem by offering several (mutually inconsistent) routes for the government to use in bringing defendants to trial following a superseding indictment. Unfortunately, none finds support in the statute. This state of affairs strongly suggests that respondent's

underlying premise—his claim that he is entitled to a new 30-day preparation period—is incorrect.

a. Respondent's principal proposal (Br. 30-31) is that, when a superseding indictment is returned before the original indictment is dismissed, both the 30-day and the 70-day periods begin running anew.[3] Under this view, the government could avoid the strictures of the Act and secure additional delay in any case by the simple expedient of filing a superseding indictment making minor changes in the description of the offense. Such a result would not be tolerable, and in fact the structure of the statute makes it plain that respondent's suggestion is untenable. When an indictment is dismissed on the government's motion and new charges subsequently are filed against the defendant for the same or a related offense, a new 70-day period is *not* provided; instead, Section 3161(h)(6) provides only that the

[3]Respondent's reading draws some support from *United States* v. *Feldman*, 761 F.2d 380 (7th Cir. 1985), which held that the defendant is entitled to a new preparation period after the return of a superseding indictment. See *id.* at 388-389. But the court of appeals there based its holding on an irrational distinction. It acknowledged that a new preparation period may not be granted when the government moves for and obtains dismissal of the first indictment after obtaining the superseding indictment. *Ibid.* (citing *United States* v. *Horton*, 676 F.2d 1165, 1170 (7th Cir. 1982), cert. denied, 459 U.S. 1201 (1983)). The court offered no reason for its conclusion that a different result is in order when the government fails to seek dismissal of the first indictment after obtaining a superseding indictment. In any event, *Feldman*—unlike this case—involved a superseding indictment that added new counts and new substantive offenses (761 F.2d at 389), factors that made the need for additional preparation time more apparent than it is here. While the Court need not decide the question in this case, we submit that additional preparation time should not be made available automatically under Section 3161(c)(2) even when the superseding indictment adds new charges. See *United States* v. *Gallo*, 763 F.2d 1504, 1522-1524 (6th Cir. 1985); *United States* v. *Guzman*, 754 F.2d 482, 485-486 (2d Cir. 1985), petition for cert. pending, No. 84-1604; U.S. Br. 24-25. When additional time is necessary, it may be provided under 18 U.S.C. 3161(h)(8)(B)(iv). See note 4, *infra*.

period between indictments is excluded in calculating the trial deadline. If Congress did not want the government to get a full 70 days after dismissal and reindictment, it is difficult to imagine that it would have wished Section 3161(c)(2) to be construed to provide for a new 70-day period after the return of a superseding indictment. Indeed, whenever Congress wanted to give the government a new 70-day period, it did so explicitly. See, *e.g.*, 18 U.S.C. 3161(d)(1) and (2), (e), (i).

b. Respondent also suggests (Br. 39) that the 30-day preparation period should simply be excluded from the 70-day calculus, so that the "speedy trial clock" would stop running for 30 days after the defendant is arraigned on a superseding indictment. Again, however, respondent's proposal is inconsistent with the structure of the Act. The exclusions from the 70-day calculus—including periods covered by continuances that are granted to give defense counsel "the reasonable time necessary for effective preparation" (18 U.S.C. 3161(h)(8)(A) and (B)(iv))—are listed in Section 3161(h). Nothing there provides for the automatic exclusion of Section 3161(c)(2)'s thirty-day preparation period. See *United States* v. *Richmond*, 735 F.2d 208, 214 (6th Cir. 1984). Indeed, the courts uniformly have calculated the expiration of the 70-day period within which trial must be held without excluding the 30-day preparation period.

c. Evidently recognizing that his submission cannot be reconciled with the Act's structure, respondent ultimately maintains (Br. 37-38) that a new 30-day period should be made available automatically even if that means that no trial date will be permissible under the Act. He suggests that the government will have brought this consequence on itself by choosing to return a superseding indictment more than 40 days after the initial indictment, and that in such circumstances it is the government's responsibility to obtain an "ends of justice" continuance under Section 3161(h)(8).

This proposal, too, is without merit. The timing of the superseding indictment is likely to follow from the grand jury's schedule or workload; in other instances, the loss of witnesses or evidence—which may occur at any time—may necessitate the dropping of counts. It is absurd to suggest that Congress wrote the Act to provide that such developments automatically would make trial impossible without judicial intervention. Instead, the Act is far more sensibly read to provide that the burden of obtaining a continuance is appropriately shouldered by the party that is seeking additional preparation time.

4. Finding nothing helpful in the language and legislative history of the Act, respondent argues (Br. 22-25) that, as a practical matter, a defendant will need an additional 30 days to prepare after the return of *any* superseding indictment. We do not deny, of course, that additional preparation time occasionally will be necessary after the return of a new indictment, and in those cases a continuance will be available under 18 U.S.C. 3161(h)(8)(B)(iv). But one need look only at the circumstances of this case and respondent's utterly unconvincing attempt to explain his need for an additional 30 days to prepare in order to see that many superseding indictments will have absolutely no effect on defense preparation. Some, as in this case, will involve the correction of nonsubstantive "clerical error[s]" (*United States* v. *Adu,* No. 84-1106 (9th Cir. Sept. 16, 1985), slip op. 5); in other cases, as was also true here, the defendant will be informed of the substance of the change long before the prosecutor has an opportunity to re-present the case to a grand jury; and in some instances the superseding indictment will simply reduce the number of charges. Such circumstances plainly do not warrant the automatic grant of an additional 30 days to prepare for trial. This is, after all,

the "Speedy Trial Act" that is being construed, not the "Delayed Trial Act." [4]

5. Respondent's argument against the application of the harmless error rule to violations of Section 3161(c)(2) also is implausible. He suggests (Br. 44) that reversal should be automatic when such a violation is found because Congress set down an "inflexible rule" that the defense should have 30 days for trial preparation. But the harmless error rule routinely is applied to equally "inflexible" provisions. See, *e.g.*, *Rosenberg* v. *United States,* 360 U.S. 367, 370-371 (1959) (violation of the Jencks Act, 18 U.S.C. 3500, held harmless); *Rogers* v. *United States,* 422 U.S. 35, 40 (1975) (harmless error rule applicable to Fed. R. Crim. P. 43); *United States* v. *Donovan,* 429 U.S. 413, 432-440 (1977) (suppression of evidence need not follow from technical violations of the wiretap provisions of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2518). There is no reason to treat violations of Section 3161(c)(2) differently. The grant of a new preparation period in a case such as this one hardly can be termed

---

[4]Both the Eleventh Circuit and the Ninth Circuit itself recently have rejected the conclusion of the court below, holding that additional preparation time must be provided after the return of a superseding indictment only when necessary to "assur[e] the defendant in a criminal case adequate time for preparation." *United States* v. *Hawkins,* No. 83-3704 (11th Cir. July 22, 1985), slip op. 5324. See *Adu,* slip op. 5. We note, however, that these courts—like several others (see U.S. Br. 33-34)—erroneously suggested that Section 3161(c)(2) might itself be the source for the new preparation period when additional time is necessary. See *Hawkins,* slip op. 5324; *Adu,* slip op. 6. As we explain in our opening brief (at 33-37), additional time, when necessary, is appropriately granted by means of a continuance issued under Section 3161(h)(8). Use of the continuance mechanism in such circumstances is consistent with the structure of the Act and gives the courts the flexibility to dole out as much time as is needed, but no more.

crucial to the integrity of the trial process. Compare, *e.g., Jackson* v. *Virginia,* 443 U.S. 307, 320 n.14 (1979). In short, respondent has confused error with prejudicial error (see U.S. Br. 40-41).

Respondent also appears to suggest (Br. 47) that the harm that would flow from a violation of Section 3161(c)(2) cannot easily be measured or evaluated. That is true in a case like the present one only in the sense that the potential harm is so microscopic as to be invisible—a problem of measurement that does not impede application of harmless error principles. In fact, as we noted in our opening brief (at 43-44), the Court has made it clear that the degree of prejudice flowing from an abridged preparation period is calculable by the courts and that reversal of a conviction requires a finding of prejudice. See *United States* v. *Cronic,* No. 82-660 (May 14, 1984); *Chambers* v. *Maroney,* 399 U.S. 42, 54 (1970); *Avery* v. *Alabama,* 308 U.S. 444 (1940). It may well be, as respondent suggests (Br. 44, 47), that the courts will not find prejudice when the violation of the Act is trivial. But absent a clear statement to the contrary in the Act or its legislative history, there is no reason to believe that Congress would have wanted reversals to follow from inconsequential errors.[5]

---

[5]Respondent appears to argue (Br. 23-24) that the return of the superseding indictment here prejudiced his defense. While he complains about failure to obtain his "A" file (see U.S. Br. 5), however, he does not suggest that anything about the second indictment affected his need for the file; in fact, respondent alleged in district court that the file was relevant only to his defense on the second count of the indictment, which was dismissed (see *id.* at 5-6). Respondent also suggests (Br. 23) that the superseding indictment deprived him of a defense by making it impossible for him to argue that he had not been convicted on December 17, 1981. But the superseding indictment simply made it impossible for respondent to raise a spurious defense by relying on a typographical error in the original indictment. In any event, this development should not have taken respondent by surprise; the actual date of the conviction was disclosed to respondent's counsel long before the superseding indictment was returned (see U.S. Br. 45).

For the foregoing reasons and the reasons stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

CHARLES FRIED
Acting Solicitor General

OCTOBER 1985

DOJ-1985-10